

Achieving Equal Justice for Women and Men in the California Courts

Final Report

**Judicial Council of California
Advisory Committee on Gender Bias in the Courts**

July 1996

Editors

Ms. Gay Danforth
Editor in Chief
Attorney

Ms. Bobbie L. Welling
Project Manager and Program Attorney
Administrative Office of the Courts, Education Division
Center for Judicial Education and Research

July 1996

Table of Contents

Preface xiii

Acknowledgments xv

Roster: The Judicial Council Advisory Committee on Gender Bias in the Courts xvii

Roster: The Judicial Council Advisory Committee on Access and Fairness xxi

Chapter One *Executive Summary* 3

- I. Genesis of the Advisory Committee's Report 4
- II. Accomplishments of the Draft Report 5
- III. The Work of Updating the Draft Report 6
- IV. Summary of the Report's Substantive Conclusions and Recommendations 7
 - A. Family Law 7
 - B. Domestic Violence 11
 - C. Juvenile and Criminal Law 13
 - D. Court Administration 15
 - E. Civil Litigation and Courtroom Demeanor 17
 - F. Implementation 19
 - G. Judicial Education 20
 - H. Race and Ethnic Bias 20
- V. Conclusion 21

Chapter Two *Introduction* 25

- I. Gender Bias: The Historical Context 25
- II. What Is Gender Bias? 27
- III. Focus on Bias Against Women 28
- IV. The Genesis and Development of the Advisory Committee 31
 - A. Appointment of Precursor Committee 31
 - B. Implementation of Original Council Proposals 32
 - C. Appointment of Advisory Committee 33
 - D. The National Perspective 34
 - E. Special Focus on Gender Bias and Racial and Ethnic Bias 34
- V. Outline of the Report 34

Chapter Three *Methodology* 39

- I. Introduction: The Methodological Approach 39
- II. The Methodological Constraints 40
- III. Information-Gathering Techniques 40
 - A. A Survey of California Judges 41
 - 1. A general description of the survey 41
 - 2. Sample plan and method 42
 - 3. The response rate 43
 - 4. What the survey yielded 43
 - B. Confidential Regional Bar Meetings 43
 - C. The Public Hearings 44
 - D. Site Visits to Two Jail Facilities 45
 - E. Focus-Group Discussions at the State Bar 46
 - F. Meetings with Domestic Violence Advocates 46
 - G. Meetings with Clerks 47
 - H. Survey of Court Employment Practices 47
 - I. Reports Submitted by Affiliates of California Women Lawyers 47
 - J. Literature and Case Law Searches 48
 - K. Invitation to Comment in *California Lawyer* 48
 - L. Followup Telephone Interviews 48

Chapter Four *Civil Litigation and Courtroom Demeanor* 51

- I. Introduction 51
- II. Chapter Overview 52
- III. Methodology 52
- IV. Findings, Recommendations, Discussion, and Analysis 53
 - A. Conduct of Judges, Other Bench Officers, and Court Employees 53
 - 1. Judicial conduct 53
 - 2. Conduct of other bench officers 71
 - 3. A fairness manual for judges and court employees 74
 - 4. Informal resolution of gender-bias complaints 77
 - 5. Membership in discriminatory clubs 80
 - B. Conduct of Attorneys and Related Issues 82
 - 1. Attorney conduct exhibiting gender bias 84
 - 2. Use of gender-neutral language 94
 - 3. Appointed counsel 98
 - 4. Attorney employment 99
 - 5. Membership in discriminatory clubs 105
- V. Conclusion: Judicial Appointments 106
 - A. The Case for Diversity on the Bench 107
 - B. Rural Courts: A Case Study 113
 - C. Recommendations 114

Chapter Five *Family Law* 119

- I. Introduction 119
- II. Chapter Overview 120
- III. Methodology 122
- IV. Findings, Recommendations, Discussion, and Analysis 123
 - A. The Applicable Laws, Their Interpretation, and Their Enforcement 123
 - 1. Child support 123
 - 2. Spousal support 137
 - 3. Custody 144
 - 4. Special problems: custody and child sexual abuse 149
 - 5. Division of marital assets 156
 - B. Impediments to the Neutral Participation in Family Law Proceedings for Judges, Lawyers, and Mediators 158
 - 1. Judges 158
 - 2. Lawyers 163
 - 3. Mediators 167
 - 4. Devaluation of family law 178
 - 5. Other barriers to full and fair access to the courts for family law litigants 187
- V. Conclusion: Family Law and the Future 198
 - C. The Need for Research and Adequate Statistical Reporting 199
 - D. The Need for Judicial Education 201

Chapter Six *Domestic Violence* 205

- I. Introduction 205
- II. Chapter Overview 209
 - A. Protective Orders 210
 - 1. Temporary restraining orders (TROs) 210
 - 2. Emergency protective orders (EPOs) 210
 - B. Access to the Judicial System 210
 - C. Child Custody and Visitation 210
 - D. The Criminal Courts 211
 - E. Judicial Education 211
- III. Methodology 211
- IV. Recommendations, Findings, Discussion, and Analysis 212
 - A. Protective Orders 216
 - 1. Temporary restraining orders—ex parte and after hearing 217
 - 2. Emergency protective orders 234
 - B. Access to the Judicial System 235
 - 1. Court safety 235
 - 2. Non-English-speaking victims of domestic violence 237
 - 3. Economically disadvantaged victims of domestic violence 238

Chapter Six *Domestic Violence (cont'd)*

- C. Child Custody/Visitation 240
 - 1. Mediation 241
 - 2. Custody and visitation orders 250
- D. Criminal Prosecution 255
 - 1. Diversion 256
 - 2. District attorneys/city attorneys 259
 - 3. Victim-witness assistance programs 262
 - 4. Law enforcement 263
- E. Judicial Education 266
- V. Conclusion 271

Chapter Seven *Criminal and Juvenile Law* 275

- I. Introduction 275
- II. Chapter Overview 276
- III. Methodology 277
- IV. Findings, Recommendations, Discussion, and Analysis 278
 - A. Appointed Counsel 278
 - 1. Statutory background 280
 - 2. Present court practices and procedures 282
 - 3. Potential for unequal treatment 282
 - 4. Need for understanding of qualifications and criteria for appointments 284
 - 5. Underrepresentation of female attorneys in serious felony cases and overrepresentation in juvenile proceedings 284
 - 6. Need for recruitment 286
 - 7. Need for statistics 286
 - 8. Conclusion 287
 - B. Programs, Services, and Facilities for Inmates 287
 - 1. Local programs and services administered or supervised by probation departments or county welfare agencies 288
 - 2. Institutions and placements 297
 - 3. Education and training programs 304
 - C. Special Needs of Institutionalized Females 308
 - 1. Need for adequate and appropriate clothing 310
 - 2. Special hygiene problems of institutionalized females 310
 - 3. Hardware and shackles amenable to the female form 312
 - 4. Residential prison and jail programs that unite mothers and children 312
 - 5. Visitation 315
 - 6. Facilities and visitation programs for juvenile mothers 317
 - 7. Juvenile dependency cases—reunification 318
 - 8. Conclusion 319

Chapter Seven *Criminal and Juvenile Law (cont'd)*

- D. Medical Problems of Institutionalized Females 319
 - 1. Statutory framework 320
 - 2. Need for medical services 321
 - 3. Need for drug detoxification programs and AIDS testing 322
 - 4. Need for protocols and minimum standards 322
 - 5. Perinatal needs of institutionalized juveniles 323
 - 6. Conclusion 325
- E. Sexual Assault and Sexual Harassment Suffered by Inmates 325
- F. Juvenile Dependency Proceedings 326
 - 1. Parental ignorance of dependency law and procedures 327
 - 2. Notice to parents in custody or detention regarding dependency, delinquency, and termination of parental rights proceedings 329
- G. Enhancing Status of the Juvenile Court 331
 - 1. Nexus between low priority and lack of resources 332
 - 2. Need to revise juvenile caseload measures 334
 - 3. Judicial assignments 335
 - 4. Conclusion 335
- H. Judicial Training 335
 - 1. Need for judicial training programs 336
 - 2. Credibility issues and sexual stereotypes 337
 - 3. Fairness in jury selection 338
 - 4. Conclusion 339

Chapter Eight *Court Administration* 343

- I. Introduction 343
- II. Chapter Overview 345
- III. Methodology 346
- IV. Findings, Recommendations, Discussion, and Analysis 348
 - A. Court Employment Practices 348
 - 1. Need for comprehensive personnel plans 348
 - 2. Elements of a personnel plan 352
 - 3. Need for judges to approve and comply with the personnel plan 375
 - 4. Administrative Office of the Courts as a resource and clearinghouse for court personnel plans 377
 - 5. Need for training of all courtroom attachés 378
 - B. Judicial Leave Policy 380
 - C. Child Care for Court Employees and Court Participants 382
 - 1. Child care for court employees 382
 - 2. Child care for court participants 384
 - D. Employment Practices and Gender-Biased Teaching in Law Schools 388
- V. Conclusion 394

Chapter Nine *Implementation* 399

- I. Introduction 399
- II. The Need for an Implementation Committee 400
- III. The Need for Judicial Education 403
 - A. The National Perspective 405
 - B. Judicial Education on Gender Bias in California 406
 - C. The New Challenge in Judicial Education 406
 - 1. Judicial education as the preferred tool for correcting gender bias 406
 - 2. The need for improvement in curriculum and teaching methods 408
 - D. Judicial Education on Gender Bias: The Course Content 413
 - E. Conclusion 413

Chapter Ten *The Future in California: A Majority of Minorities* 417

- I. Demographics 417
- II. The Multiple Effects of Bias Based on Race, Ethnicity, and Gender 418
- III. The Need for a Task Force on Ethnic and Racial Issues of Bias in the Courts 419
- IV. Summary of Data 423
 - A. Judicial Conduct 423
 - B. Criminal and Juvenile Law 424
 - C. Domestic Violence and Family Law 427
 - D. General Barriers to Access to Court 428
 - 1. Lack of access to the courts 428
 - 2. Professional issues for attorneys 429
 - 3. Court employees 430
 - E. Language Barriers to Access to the Courts 431
- V. A Note on Judicial Appointments 432
- VI. Conclusion 433

Chapter Eleven *Conclusion* 437

Chapter Twelve *Recommendations* 441

Chapter Thirteen *Appendices*

- A. Fact Sheet
- B. Chief Justice's Speech
- C. Chief Justices' Resolution
- D. Judges' Survey Questionnaire and Cover Letter
- E. Other Survey Instruments
- F. List of Public Hearing Witnesses
- G. List of Focus Group Invitees
- H. Request for Comments Published in *California Lawyer*
- I. July Developing Management Skills Questionnaire
- J. October Association of Municipal Court Clerks Questionnaire
- K. Spring 1988 Questionnaire to all Courts
- L. Tabulation of Responses to 1989 Questionnaire on Court Employment Practices
- M. Alameda County Superior Court Discrimination and Sexual Harassment Policies and Procedures
- N. Educational Materials
- O. Criminal Justice Statistics

Preface

In 1990 the Judicial Council Advisory Committee on Gender Bias in the Courts, co-chaired by Los Angeles Superior Court Judge David M. Rothman and Los Angeles Senator Diane E. Watson, submitted for council review and approval an extensive draft report containing 68 recommendations. The committee found that gender bias was a significant problem in the courts as it was throughout society. The recommendations were designed to ensure fairness for all participants in the court system. The council convened a special internal subcommittee chaired by then associate justice, now Chief Justice, Ronald M. George to analyze the recommendations and report back to the council. Based on the subcommittee's report, the Judicial Council of California unanimously adopted the recommendations.

The 1990 report has now been edited and refined, but no substantive changes have been made. This report constitutes the final version of the original draft report submitted to the council. The Judicial Council authorized its revision and publication so that the important issues of gender fairness in the courts discussed in the report would be placed in the public record. The council also authorized publication and distribution of an implementation report chronicling the specific steps taken since the time the recommendations were adopted to ensure gender fairness in the California court system. The implementation report is contained in the Judicial Council's 1996 Annual Report. Reprints of the implementation report itself are available as well.

Today approximately one-third of the recommendations have been implemented, and numerous others are in various stages of completion. This record of progress toward ensuring gender equity in the courts is due to the efforts of the Judicial Council and its committees, the judicial education division (the Center for Judicial Education and Research), and a wide variety of individuals and organizations throughout the state dedicated to fairness in our justice system.

This final report and the implementation report were prepared under the direction of the Judicial Council Access and Fairness Advisory Committee, chaired by South Bay Municipal Court Judge Benjamin Aranda, and its Gender Fairness Subcommittee, chaired by Los Angeles Superior Court Judge Meredith C. Taylor. The Judicial Council is committed to continuing the work of ensuring fairness in the courts as reflected in the first goal of its strategic plan, to: "Improve access, fairness, and diversity in the judicial branch."

Acknowledgments

Countless individuals and organizations throughout the justice system contributed to the Gender Fairness Project, its initial draft report, this final version, and the implementation of the gender fairness recommendations. Primary thanks go to the committee members themselves who gave freely of their time and expertise, the numerous experts and lay people who supplied testimony and information, and the groups who have worked diligently to ensure fairness in the courts. The editors wish especially to thank Dr. Norma J. Wikler, founding director of the National Judicial Education Project to Promote Equality for Women and Men in the Courts and special committee advisor appointed by former California Chief Justice Malcolm M. Lucas, for her unstinting devotion to gender fairness in the courts nationally, her inspiration, and her conviction that a final version of this report should be published. Finally, the editors wish to thank the employees of the Administrative Office of the Courts, Administrative Support Unit, whose skill and commitment to excellence made publishing this important report possible.

Judicial Council

Advisory Committee on Gender Bias in the Courts

Hon. David M. Rothman, Co-chair
Judge of the Los Angeles Superior Court

Hon. Diane E. Watson, Co-chair
Member of the Senate, Los Angeles

Hon. Judith C. Chirlin, Vice-chair
Judge of the Los Angeles Superior Court

Mr. James J. Brosnahan
Attorney, San Francisco

Mr. Kenneth Mark Burr
Deputy District Attorney, Alameda County

Ms. Juana C. Conrad
Former Court Administrator
East Los Angeles Municipal Court District

Ms. Tamara C. Dahn
Attorney, Vallejo

Mr. Rene C. Davidson
Former Alameda County Clerk

Hon. Norman L. Epstein
Associate Justice
Court of Appeal, Los Angeles

Hon. Lisa Hill Fenning
Chair, Subcommittee on Court Administration
Judge of the U.S. Bankruptcy Court, Los Angeles

Hon. Judith Donna Ford
Judge of the Oakland-Piedmont-Emeryville
Municipal Court

Hon. Elihu M. Harris
Former Member of the Assembly
Mayor of the City of Oakland

Ms. Linda Herman
Past President, California League of Women Voters

Ms. Marian McClure Johnston
Attorney, Sacramento

Ms. Sheila James Kuehl
Chair, Subcommittee on Domestic Violence
Member of the Assembly, Los Angeles

Hon. Elwood Lui
Retired Associate Justice
Court of Appeal, Los Angeles

Hon. Alice A. Lytle
Judge of the Sacramento Superior and Municipal Courts

Hon. Judith McConnell
Judge of the San Diego Superior Court

Hon. Linda Hodge McLaughlin
Judge of the U.S. District Court
Central District of California, Southern Division

Hon. Frances Munoz
Judge of the Orange County Harbor Municipal Court

Ms. Andrea Sheridan Ordin
Attorney, Los Angeles

Hon. Sheila F. Pokras
Judge of the Los Angeles Superior Court

Hon. Sara K. Radin
Retired Judge of the Los Angeles Superior Court

Hon. Brian L. Rix
Retired Judge of the North Butte County Municipal Court

Mr. Herbert M. Rosenthal
Chair, Subcommittee on Civil Litigation and
Courtroom Demeanor
Executive Director, State Bar of California

Ms. Patricia Ann Shiu
Attorney, San Francisco

Hon. Fern M. Smith
Judge of the United States District Court
Northern District of California

Hon. Sheila Prell Sonenshine
Associate Justice
Court of Appeal, Santa Ana

Ms. Marjorie Swartz
Attorney, Sacramento

Hon. Meredith C. Taylor
Chair, Subcommittee on Family Law
Judge of the Los Angeles Superior Court

Hon. Jack Tenner
Retired Judge of the Los Angeles Superior Court

Hon. Kathryn Doi Todd
Chair, Subcommittee on Criminal and Juvenile Law
Judge of the Los Angeles Superior Court

Dr. Norma J. Wikler
Adviser to the Committee
Former Director of the National Judicial Education Project
to Promote Equality for Women and Men in the Courts

Mr. Frank S. Zolin
Former County Clerk-Executive Officer
Los Angeles Superior Court

Judicial Council

Advisory Committee on Access and Fairness

Hon. Benjamin Aranda III, Chair
Judge of the South Bay Municipal Court

Mr. Elliott L. Aheroni
Attorney, Encino

Hon. Gail Brewster Bereola
Judge of the Oakland-Piedmont-Emeryville
Municipal Court

Ms. Phyllis J. Culp
State Bar of California

Hon. Rudolph Diaz
Judge of the Rio Hondo Municipal Court

Ms. Joanne Frankfurt
Hearing Referee
Fair Employment and Housing Commission

Ms. Janet M. Gallagher
Executive Officer
Madera County Superior Court

Hon. Donna Hitchens
Judge of the San Francisco Superior Court

Hon. Frederick P. Horn
Judge of the Orange County Superior Court

Hon. Gregory Jensen
Judge of the San Mateo Municipal Court

Professor Maryann Jones
Acting Dean
Western State University Law School

Hon. Anthony C. Joseph
Judge of the San Diego Superior Court

Ms. Gail C. Kaplan
Attorney, Santa Monica

Hon. Ken M. Kawaichi
Judge of the Alameda Superior Court

Hon. Barry B. Klopfer
Judge of the Ventura Municipal Court

Ms. Susan Null
Court Executive Officer
Shasta County Superior and Municipal Courts

Mr. Gordon R. "Sam" Overton
Deputy Attorney General, Los Angeles

Ms. Drucilla Stender Ramey
Executive Director and General Counsel
Bar Association of San Francisco

Hon. Martin C. Suits
Retired Judge of the Kings County Municipal Court

Hon. Meredith C. Taylor
Judge of the Los Angeles Superior Court

Dr. Dorothy M. Tucker
Los Angeles

Ms. Carole Wagner Vallianos
Past President, League of Women Voters

Hon. Fumiko Hachiya Wasserman
Judge of the Los Angeles Superior Court

Hon. G. Keith Wisot
Retired Judge of the Los Angeles Superior Court

Hon. Barbara Zuniga
Judge of the Contra Costa Superior Court

Chapter One

Executive Summary

EXECUTIVE SUMMARY

In March 1990, the Judicial Council issued its pathbreaking, comprehensive draft report on gender bias in the California court system, *Achieving Equal Justice for Women and Men in the Courts*. The draft report was the culmination of three years' hard work by the Judicial Council Advisory Committee on Gender Bias in the Courts ("advisory committee"),¹ which had been charged by former Chief Justice Malcolm M. Lucas with investigating and documenting instances of gender bias throughout the courts. The advisory committee in fact found significant and widespread gender bias in the California court system and offered 67 separate recommendations for change.²

Six years later, as this report is issued in final form and a companion implementation report is released, the questions addressed by the advisory committee retain their importance and complexity. The nation's obsession with the "trial of the century," O.J. Simpson's double murder trial, is just one example of how gender bias continues to haunt us. Through unprecedented media coverage, that trial has brought into the homes of most Americans several of the issues that this report sought to address, including the use of child custody as a bargaining chip, the courts' approach to domestic violence, and the stereotypes faced by women lawyers.³

These and other issues of gender bias in the courts have not gone away in the time between the issuance of this report in draft and in final. If anything, economic and demographic trends over the past five years have made the work of the advisory committee more pertinent to Californians' daily lives and more crucial to implement. Still, much has been accomplished in the intervening years. As the implementation report

¹ The members of the advisory committee are listed in the front matter of this report, described in this summary, and listed in the fact sheet in Appendix A of this report.

² An additional recommendation was added later, for a total of 68 recommendations. Although slightly modified by the Judicial Council prior to adoption, the recommendations were adopted substantially as proposed by the advisory committee. They were presented throughout this report and appear in a separate chapter in their final form.

³ For example, during the trial, lead prosecutor Marcia Clark was repeatedly criticized for her style of dress and was served with custody papers by her former husband, who claimed that Ms. Clark's work schedule makes her unfit to retain custody of her children.

published with this volume documents, great progress has been made on a number of the advisory committee recommendations. Progress has also occurred on the national level, as state and federal task forces have continued the work of documenting gender bias in other court systems.⁴

This executive summary will outline the major conclusions of the advisory committee in the five principal areas it considered: family law, domestic violence, criminal and juvenile law, courtroom administration, and civil litigation and courtroom demeanor. This executive summary will also describe the committee's call for implementation work and for fully developing judicial education on gender bias. Before considering these conclusions, the summary will describe the advisory committee's approach to the problem of gender bias, the uniqueness of the committee's work, and the work done to update this report.

I. GENESIS OF THE ADVISORY COMMITTEE'S REPORT

From the outset, the committee was blessed with extraordinary talent and leadership. The co-chairs, Superior Court Judge David M. Rothman, a national expert on judicial ethics, and Senator Diane E. Watson, from the 26th senatorial district in Los Angeles, offered a wealth of experience and firm guidance. The committee also benefited from the exceptional contributions of its vice-chair, Los Angeles Superior Court Judge Judith C. Chirlin, and its subcommittee chairs, Mr. Herbert Rosenthal, Executive Director of the State Bar of California, Los Angeles Superior Court Judge Meredith C. Taylor, Sheila James Kuehl, then Managing Attorney of Southern California Women's Law Center and now a member of the Assembly from the 41st assembly district in Los Angeles, Los Angeles Superior Court Judge Kathryn Doi Todd, and United States Bankruptcy Judge Lisa Hill Fenning. Space does not permit a full description of the superb credentials and experience of these and the other talented members of the advisory committee.⁵

All of the advisory committee members donated countless hours of their time toward formulation of the recommendations and publication of the draft report. Their work was immeasurably improved and facilitated by the contributions of a nationally recognized expert on gender bias, Dr. Norma Wikler, who served as special advisor and consultant. Dr. Wikler, former professor of sociology at the University of California at Santa Cruz, was the founding director of the National Judicial Education Project to

⁴ See Babcock, *Introduction: Gender Bias in the Courts and Civic and Legal Education* (1993) 45 Stan.L.Rev. 2143, note 2 ("As of the time of this writing, at least twenty-eight states and the District of Columbia have studied the issue of gender bias in the courts...."); see also *id.*, p. 2146, note 19 (collecting citations to articles on gender bias task forces).

⁵ See Appendix A for a complete list of the committee members and their affiliations as of the publication of the draft report (March 1990).

Promote Equality for Women and Men in the Courts. Dr. Wikler is an internationally recognized scholar and expert on the subject of gender fairness.

The advisory committee began its work in April 1987 with its first meeting. The first order of business was to develop a working definition of gender bias. The committee defined such bias as behavior or decision-making in the justice system which is based on or reveals (1) stereotypical attitudes about the nature and roles of women and men; (2) cultural perceptions of their relative worth; or (3) myths and misconceptions about the social and economic realities encountered by both sexes.

The committee developed a research plan and pursued a methodological strategy that sought to gather information from diverse sources in order to obtain a composite picture of the problems of gender bias in the courts. Over and over again, the committee found that the information gathered from many different sources was mutually corroborative. The committee's methodological approach was consistent with that used by other gender bias task forces across the country.⁶

In pursuing its research agenda, the advisory committee conducted five public hearings in different parts of the state, sent out an 18-page survey to which 73 percent of the state's judges responded, heard testimony from 200 attorneys at six confidential regional meetings, and visited two correctional facilities for women prisoners. The committee also received more than 200 comment letters from around the state, solicited reports from women's bar groups, and conducted a survey of court employment practices.

After completing the information-gathering phase, the advisory committee conducted a series of intensive meetings to develop the appropriate recommendations for change. The committee thoroughly and vigorously discussed the issues, and ultimately reached consensus on each recommendation. The writing of the draft report centered on explaining the need for the recommendations in each substantive area.

II. ACCOMPLISHMENTS OF THE DRAFT REPORT

The draft report received widespread praise from within the court system and without. California's report was considered by other states, at national conferences on gender fairness, and by the Ninth Circuit. The draft report's release was covered by newspapers statewide, and was applauded by prominent editorial writers. In particular, the *Los Angeles Times* praised the report's recommendations for providing "ways to curb both egregious and subtle discrimination against women in the legal system" and predicted that, once implemented, the recommendations would "make California a leader

⁶ As a leading scholar has written approvingly, "The mixture of quantitative data and experiential testimony that has been the fixture of task force reports is the lawyer's form of consciousness raising, the recounting of individual stories is the paradigmatic feminist method." Babcock, *supra*, p. 2148.

among states..."⁷ In addition, the Administrative Office of the Courts (AOC) received numerous letters of support during the public comment period.

California's draft report was considered innovative and important, not only because it was among the first. Rather than focusing exclusively on issues affecting women lawyers and court personnel (although these are covered in the chapters on civil litigation and courtroom demeanor, and court administration), the draft report exhaustively documented conditions in several areas of substantive law that especially affect low-to-middle-income women: family law, domestic violence, criminal law, and juvenile law. In these areas, the draft report found gender bias to be most pernicious in its systemic manifestations, such as the denial of women's access to the courts through lack of adequate representation, information, and courthouse child care. The report also stressed the devastating impact of another form of systemic bias: women's lack of credibility in the legal system. Consistent with an emphasis on "real people" who use the courts, the draft report provided accurate and telling detail about specific instances of gender discrimination; it was thus a far more particularized document than many of the other gender bias reports issued to date.

Finally, the draft report was considerably more ambitious than other state reports in setting an agenda for ensuring fairness in the courts of the future. Toward that end, the report included chapters on the importance of studying the effects of discrimination on minorities in the court system, and on the critical need to implement the recommendations, especially through ongoing and widespread judicial education. The report focused on the positive aspects of change, offering specific, well-conceived recommendations aimed not only at ending gender bias but also at improving the administration of justice generally. In sum, the draft report was a recommendation-driven blueprint for ameliorating gender bias in California's courts.

III. THE WORK OF UPDATING THE DRAFT REPORT

To convert the draft report into a final document for inclusion in the public record, the AOC hired a consultant to perform a substantive cite-check and a comprehensive edit. The revision process focused on verifying the accuracy of the citations and tightening the text—not on updating the materials to reflect new developments or the passage of time. In some instances, however, new sources have been added and statutory citations have been revised to reflect changes in the law. Essentially, the final report reproduces the conclusions and discussion of the draft report, only in a more readable and accurate form. A summary of those conclusions follows.

⁷ Editorial, *How Gender Bias Creeps into Courts: Judicial Council Proposals Are Brilliantly to the Point* (Nov. 27, 1990) Los Angeles Times, p. B6.

IV. SUMMARY OF THE REPORT'S SUBSTANTIVE CONCLUSIONS AND RECOMMENDATIONS

A. FAMILY LAW

The most comprehensive and the first substantive law chapter of the report is devoted to family law, an area that touches the lives of many Californians and that evokes strong emotional responses in almost everyone. It is also an area of law that changes rapidly, subject to never-ending legislative reform efforts.

As a leader of the task force movement put it, family law is an "area in which gender bias is rampant in the courts. . . ; probably because this is an area in which judges have the greatest discretion and where biases are the strongest."⁸ The advisory committee in fact found gender bias in the administration of family law in California, and recommended changes in child and spousal support, custody, the division of assets, the assignment of judges, training of family lawyers, and mediation. The committee also found that equality will not be achieved in family law until it is accorded greater priority, is made more accessible to the public, and is the subject of further research and study. All in all, the committee offered 18 separate recommendations for eliminating bias in family law, recommendations that will also improve the administration and practice of this crucial area of law. The committee's major reform proposals were in the areas of child support, child custody, mediation, and the administration of the family law courts.

In the area of child support, the advisory committee found that such awards are too low, that minimum child support awards are used as a ceiling rather than a floor, and that the duration of child support payment obligations is too short. The committee further found that child support is used inappropriately as a bargaining chip in custody disputes. In addition, methods of enforcing child support orders must be improved. As a general matter, the inadequacy of child support has a disproportionate impact on the primary caretakers of the children, who are still usually women.

The advisory committee made a number of recommendations for improving child support. These included studying the adequacy of child support guidelines and introducing new legislation. The legislation sought by the committee would (1) require judges to state the factors on which they rely in setting child support awards at the minimum level; (2) assure that children, after divorce, continue to share in the increased standard of living of the higher income parent; (3) extend the duration of child support to age 21; and (4) prevent shared custody from reducing child support obligations.

With respect to child custody, the committee found that when judges make custody decisions, they do so within a relatively uncharted zone of discretion, and biases about

⁸ Schafran, *Gender Bias in the Courts: Time is not the Cure* (1989) 22 Creighton L. Rev. 421.

the proper roles of women and men inherently affect those decisions. Without making a determination of the appropriate standard for determining custody, the committee concluded that bias in custody decision-making is best cured by judicial, attorney, and mediator education. Research on the nature of custody arrangements that will truly be in the best interests of our children is urgently needed. The committee found that custody battles should be resolved as quickly as possible, and custody trials should be given the preference accorded them by statute.

Where child abuse allegations are made in the course of a custody dispute, the committee found little evidence of rampant false allegations by mothers against fathers to gain an advantage in the custody dispute or to punish the father for leaving. Instead, the committee found other explanations for the apparent tendency of allegations of child sexual abuse to surface in the context of a divorce when they were not made prior to the separation of the parties.

The committee found that stereotypes and prejudices influence decision-making in the area of custody disputes. One example is the tendency to doubt the credibility of women who make allegations of child abuse and characterize them as hysterical or vindictive, even when medical evidence corroborates the claim. The committee determined that there is an urgent need for speedy and expert resolution of these disputes.

Among the committee's recommendations for eliminating gender bias in custody decisions were calls for increased funding of research on joint custody and adoption of a model protocol for judges asked to resolve custody disputes involving allegations of child sexual abuse. In that regard, the committee believed that family law judges should be provided with access to existing investigatory reports on child abuse allegations and should have the power to order a separate investigation. Finally, the committee called for mandatory inclusion of custody issues in judicial education programs, including educating judges on the need to accord such matters their statutorily required scheduling preference.

Mediation was another controversial area addressed by the advisory committee. Recognizing mandatory mediation of child custody and visitation disputes as a vital tool for backlogged courts to expeditiously resolve this form of litigation, the committee nonetheless had serious misgivings about the fairness of the process for women, who are traditionally in less powerful positions and who lack equal bargaining power. The committee was also concerned that the level of qualifications and training of mediators throughout the state was not uniform and needed improvement.

Committee recommendations pertaining to mediation included requiring mediators to be educated on gender stereotypes and the relative power balance between the parties, and to adhere to an ethical duty to refrain from exhibiting gender bias in all aspects of the

mediation process. In addition, the committee urged that recommendations from mediators be in writing and that bench officers state the reasons for relying on a mediator's report in making orders. The committee also called on the Judicial Council's Family Law Advisory Committee and the Statewide Office of Family Court Services to jointly study the custody evaluation process and recommend ways to improve the qualifications and professional standards of evaluators. Finally, with respect to the users of mediation, the committee would require that the parties be informed about mediation and the ways in which the information obtained by the mediator will be used, and be provided with a simple grievance procedure for complaints about the mediation.

In considering the administration of family law, the advisory committee found a number of areas in which unsatisfactory conditions create the potential for gender bias in decision-making. Specifically, the committee found that judges rate the family law assignment as their lowest preference by a wide margin, and that working conditions for family law judges are substandard. Time constraints, inadequate staffing, and pressure to move calendars augment the stress inherent in hearing matters of great emotional import to the parties, resulting in judicial burn-out among family law judges, especially among those who hear requests for temporary support, visitation, and custody. The committee further found that the inadequacy of the working conditions and the unpopularity of the assignment may be due to the low priority accorded to "women's and children's issues." The committee determined that more attorneys with demonstrated expertise in family law should be appointed to the bench. In addition, in many counties, there is no gender diversity among judges hearing family law matters, either because no female superior court judge has been appointed or elected in the county or because no female superior court judge has been assigned to a family law department.

The advisory committee also found that too few judges are assigned and too few courtrooms are available to resolve family law matters in California. The family law court has been relegated to an inferior status among the other departments and functions of the court, and the proportion of the court's resources devoted to family law is not commensurate with either the volume of cases, or the importance of family law issues to the parties and society. The lack of available resources has sometimes had the practical effect of coercing the settlement of family law matters, forcing counsel to seek references to private judges, or otherwise inappropriately denying courtroom time for the resolution of family law matters. The committee further found that delay in family law is endemic, and there is little case management; these factors adversely affect the impecunious spouse, who is most often the woman. Finally, conflicting orders affecting families and a lack of coordination and communication among the various departments of the court, including those situated in different counties, further exacerbate these adverse conditions for those families who are in the most distress.

The advisory committee made a number of recommendations for improving the administration of family law and lessening the potential for gender bias. For example, the committee recommended that the Judicial Council Court Profiles Advisory Committee reevaluate the method of weighting family law cases to ensure an adequate number of family law judges, and that the Advisory Committee on Family Law⁹ examine the working conditions and educational needs of family law judges and submit recommendations to the Judicial Council for ways in which the family law assignment might be enhanced. The committee also recommended the creation of a pilot program for reducing delay in family law matters, and the development of protocols for solving the problems caused by the overlapping jurisdiction of the family, juvenile, and criminal law departments.

In reviewing family law, the advisory committee discovered a number of barriers to access to the courts—barriers that have their most serious impact on the poor and on the primary caretakers of children, who are most often women in this context. For example, the committee found that public information on family law is grossly inadequate. The committee also found that inequities in the award of attorney's fees present serious obstacles to obtaining representation. These inequities include the denial of fees when they should be awarded according to case law and the granting of differential awards between male and female attorneys. The committee found that additional obstacles to progressing through the family law system sometimes exist, including obstructionist and unhelpful practices by clerks' offices, denial of appropriate requests for fee waivers, and imposition of job-search requirements upon women receiving welfare grants for dependent children.

To improve access to the courts, the committee urged the development of a general information booklet or other educational device for family law litigants; the formation of a State Bar task force to focus on solutions to the crisis in representation in family law matters; and the adoption of legislation that would ensure that each party has access to legal representation to preserve all of his or her rights.

Finally, the advisory committee perceived an urgent need for further research on the volatile topics involved in family law. The committee determined that changes in this area of law are often initiated without a proper research foundation and without regard to future evaluation of the change. The committee found that the failure to conduct appropriate research and collect adequate data has insulated California policies and practices from meaningful review and criticism.

The advisory committee therefore proposed that the Judicial Council add staff, budget, and other resources to provide for and ensure the creation of a uniform statistical

⁹ Now the Judicial Council Family and Juvenile Law Advisory Committee.

reporting system in family law, and to reevaluate the research priorities of the Statewide Office of Family Court Services in light of this report.

B. DOMESTIC VIOLENCE

The committee's second substantive area of inquiry was domestic violence. The predominant message of this chapter was that those in the judicial system who deal with domestic violence need to be educated, and the system needs alteration, so that the nightmare of domestic violence is abated, and not aggravated, by resort to the judicial system.

Because 95 percent of the victims of domestic violence are women, the judicial system's unequal and inadequate treatment of such victims and of the crime of domestic violence raised serious issues of gender bias. The evidence gathered by the committee demonstrated that when domestic-violence victims seek protection from the court, they are often further victimized by the process and by their experiences within the judicial system. The committee found that legislative efforts to protect victims of domestic violence have not been adequately enforced.

In 15 recommendations and 11 separate findings, the committee sought to address the difficulties faced by domestic-violence victims who seek to obtain the protection that the law guarantees, and to suggest new or modified procedures and legislation to help ensure that the judicial system adequately, effectively, and fairly protects those who are battered from further abuse. These recommendations and findings concerned the major areas in which domestic-violence victims interact with the judicial system: seeking protective orders against future abuse, resolving child custody and visitation disputes with their batterers, and participating in criminal prosecutions of the batterers. The committee also considered the difficulties domestic-violence victims face in obtaining access to the courts.

The initial major area of inquiry was protective orders, often the first occasion in which victims of domestic violence interact with the legal system. By law, restraining orders are available at any time on any day, but in fact the committee found that various obstacles often bar victims from obtaining the relief to which they are entitled. Some procedural barriers can be readily removed by new rules of court; other barriers, such as victims' lack of information on procedural requirements and the judiciary's and law enforcement's lack of understanding of the realities of domestic violence, can be remedied by education. One of the most critical changes needed is more effective enforcement of restraining orders after they are issued, so that such court orders will actually prevent further abusive behavior. The committee recommended that all of these steps be undertaken.

Another major problem area involved child custody and visitation disputes between parents when there has been a history of domestic violence. The committee concluded that mandatory mediation too often places the alleged batterer and the victim face-to-face, physically and psychologically endangering the victim and also enabling the alleged batterer to exert undue influence in what is intended to be a freely negotiated resolution of the dispute. The committee also found that custody and visitation orders frequently fail to include adequate provisions to prevent further abuse, giving batterers unrestricted access to their children and therefore unrestricted access to their abused spouse. Finally, in the committee's view, the judicial system needs to recognize the harmful effect of domestic violence on children who witness such violence, even if the children are not themselves physically abused. The committee made a number of recommendations aimed at improving the way custody and visitation disputes involving domestic violence are handled, including increased judicial and mediator education on the need for separate mediation and enhanced courthouse safety measures.

The committee concluded that the criminal justice system also disfavors victims of domestic violence, as domestic-violence crimes are too frequently treated less seriously than similar violence against strangers. One major finding concerned the availability of pre-guilty plea diversion for those accused of spousal abuse. Under this system, the committee found that batterers often escape any punishment, and are not effectively deterred from committing further abuse; the message given to both victims and batterers is that the judicial system does not consider domestic-violence to be a serious crime. Among a number of criminal justice recommendations, the committee urged the creation of statewide standards for monitoring the effectiveness of domestic violence diversion programs.

Perhaps the greatest need documented by this chapter was the need for greater education. The committee recommended that judges, prosecutors, law enforcement, and other personnel involved in the legal system be educated on domestic-violence issues, so they understand that domestic-violence victims are often terrified to speak up against their abusers and may be reluctant to pursue court intervention once the immediate threat of violence has passed. Because domestic violence is a crime against society, as well as an injury to the individual victim, the committee concluded that the judicial system needs to acknowledge the seriousness of the problem and its responsibility for effective response so that the cycle of domestic violence may at last be ended.

C. JUVENILE AND CRIMINAL LAW

The committee also reviewed the juvenile and criminal law system in California for evidence of gender bias. The review concentrated on three general areas of concern: the manner in which attorneys are appointed to represent defendants in criminal and juvenile matters; the treatment female offenders receive from courts and other agencies; and the operation of the juvenile court. During the course of its inquiry, the committee found that gender bias affects the ways in which the criminal and juvenile courts operate, both directly and indirectly. In devising 11 recommendations for change, the committee focused its attention on the ways in which the criminal and juvenile justice system can be modified to avoid unequal treatment based on gender, while recognizing basic differences between men and women and the special needs of women brought into the system.

In considering its first major area of inquiry, appointment of counsel, the committee found a general lack of formal, written court policies for court-appointed attorneys statewide, creating a climate in which gender and ethnic bias are likely to grow and remain unabated. The committee also found that, on a comparative basis, women and minority attorneys receive fewer appointments on the more financially lucrative death penalty and serious felony cases, while receiving more appointments on the less lucrative juvenile and misdemeanor cases. To remedy inequity in the appointment of counsel, the committee recommended establishment of and adherence to formal written policies, as well as statewide, statistical reporting of fee-generating court appointments.

In its second major area of inquiry, conditions faced by female offenders in criminal and juvenile institutions, the committee addressed a host of issues, including the role of women as the primary caretakers of children, the special physical and medical needs of incarcerated women, and the inadequate resources available to female offenders, especially juvenile ones.

With respect to the first of these issues, the committee recognized that women are still overwhelmingly the primary caretakers of children in our society. In prison, the majority of adult women inmates are single mothers, whose children are frequently dependents of the court. The committee found a general failure to coordinate services and programs between the criminal and juvenile dependency systems, creating great hardship for incarcerated mothers and their children. These families also suffer from the geographical remoteness of many of the female prisons, as well as the justice system's failure to provide adequate reunification services.

The committee found that female juvenile offenders face similar problems. Many have young children, who are also the subject of juvenile court jurisdiction. The lack of programs to meet their special medical and mental health needs was especially critical. The committee concluded that community-based, alternative sentencing programs that keep nonviolent sentenced women and their children together should be encouraged. In

instances where institutionalized mothers cannot remain with their children, visitation programs that facilitate regular contact should be expanded.

With respect to the special needs of institutionalized women, the committee found two prison visits and follow-up interviews with staff and inmates especially helpful. Among the committee's findings in this area were that institutionalized women are forced to endure inappropriate clothing, shackles, and restraints, especially when pregnant, and that they receive inadequate accommodation to the needs of their menstrual cycles. Such women also have difficulty in obtaining appropriate medical care, including prenatal and other pregnancy-related services, medically supervised drug detoxification programs, and voluntary AIDS testing. Such women are also sometimes the victims of sexual assault and harassment while institutionalized in adult and juvenile facilities. To address the special needs of institutionalized women, the committee called for state and local agencies to develop protocols on appropriate clothing and restraints, medical care, personal hygiene, and sexual harassment.

Finally, the committee found that institutionalized women often lack the same access to less restrictive prisons and camps and to educational and other programs within those prisons and camps that institutionalized men have. This disparity was especially apparent with respect to juvenile offenders. To remedy this disparity, the committee recommended that state and local agencies offer equivalent education and training programs to men and women, and that such programs include basic vocational, health, and parenting education, as well as drug and alcohol rehabilitation.

In a third major area of inquiry, the committee considered the impact of juvenile dependency proceedings upon institutionalized women. The committee found that these women, a significant number of whom have children under the jurisdiction of the juvenile court, lack adequate information about juvenile-dependency proceedings, and are unable to make knowledgeable decisions about the placement and future of their children. In fact, the committee found institutionalized parents often do not receive proper notice of proceedings and are not provided with transportation to court or an adequate opportunity to participate in dependency court proceedings. As a result, these parents risk missing the opportunity to assert their statutory rights to participate in dependency proceedings, thereby losing custody of their children by default.

To remedy the negative impact the juvenile dependency system has upon women, the committee recommended the development and dissemination of informational materials for institutionalized parents on dependency law and procedure. The committee also called for legislation requiring state and local agencies responsible for inmates and detainees to notify and secure the presence of parents at dependency-related proceedings.

A final and related concern was the juvenile court's generally low status compared to the civil and general criminal courts. As with family law court, a factor relevant to this low status may be the perception that juvenile court addresses "women's problems." In addition, juvenile court is perceived by many as unimportant because the majority of families that come before it are poor, of color, and headed by a single parent, usually a woman. The committee therefore offered recommendations designed to enhance the status of juvenile court, through reforms in judicial assignments and caseloads, and to improve judicial education on juvenile and criminal law.

D. COURT ADMINISTRATION

Another significant area addressed by the advisory committee was court administration. In California, there are 229 separate court administrative systems, stitched together by a few statewide rules and standards. Given the high percentage of women in the court workforce and the lack of statewide standards, the committee found that the potential for gender bias in court administration exists. Despite the fragmented nature of court administration, the committee concluded that it would be relatively simple to reduce drastically the opportunity for gender bias to affect court administration. Toward this end, the committee offered a number of recommendations for reform.

First, the committee found that many court personnel plans are not comprehensive in scope, and many do not follow modern personnel practices. Because California's courts predominantly employ women in the lower-paid classifications such as clerks and secretaries, particular personnel policies can have a disparate impact on women. Policies on training, advancement, dependent care, affirmative action, pregnancy leaves, and sexual harassment are crucial in the lives of the women working in the courts; without policies that are fair and clear to management and employees alike, the committee concluded that gender bias is able to taint the decision-making that will advance or hold back these women. On the other hand, a comprehensive personnel plan can minimize the opportunities for gender bias to affect workplace decisions and resolve the confusion and inequity employees suffer under ad hoc policies.

The committee therefore recommended that comprehensive personnel plans be required for every court, and that such plans address the following subjects: salary setting; job classifications and titles; criteria and standards for promotion; performance evaluations; affirmative action; training; sexual harassment policy; grievance procedures; professional behavior; and employee work schedules, leaves and benefits. The committee further recommended that judges be required to comply with the personnel plan, and that the AOC serve as a clearinghouse and resource for model court personnel practices, enabling all courts to benefit through shared knowledge of preferred personnel policies.

Another area considered by the committee was the role of employees not directly under the court's authority. During the course of the public hearings and in many written

submissions, the committee found that female attorneys, employees, and court-users often complained about the gender-biased treatment they received from court attachés who were not under the employment jurisdiction of the judge or court executive officer. Bailiffs, county clerk employees, and probation officers were some of the court attachés mentioned. The committee therefore recommended that presiding judges be required to evaluate the training given to court employees not employed by the judges or court executive officer, so that an informed decision can be made about the need to invite these employees to join in court-sponsored training on gender fairness and sexual harassment.

The committee looked at gender bias against judges as well. As the number of judges in the childbearing years increases, the need for a judicial leave policy becomes more pressing. The California Judges Association has noted that an unduly limited leave policy or the lack of any leave policy can deter women of child-bearing age or their spouses from serving in the judiciary. A comprehensive judicial leave policy, as recommended by the committee, will guard against arbitrary denials of leaves to some judges or any appearance of unfairness to the other judges on the bench.

The committee also concluded that parents working in the court and parents coming to court as witnesses, jurors, and litigants need affordable, accessible child care. Ignoring this need has led to absent employees and witnesses, delinquent jurors, distracted litigants, and disrupted court proceedings. It is common knowledge that as the family patterns and mobility of the American population have changed, many children no longer have the safe, free option of staying with relatives. The committee recommended that courts work with county administration to provide both regular and drop-in daycare for children of employees and court participants for a reasonable fee.

Finally, the committee found that gender bias may taint both the employment practices and the curricula and teaching methods of many California law schools. Female professors have been denied tenure under circumstances that bespeak gender bias. Sexual harassment and gender-biased recruitment have been reported on campus. Casebooks have continued to portray stereotypical females, teachers have continued to discount female experience, and gender bias itself has been neglected as a subject studied in the schools for its impact on substantive law or trial practice. The committee urged law schools to develop written policies to help eliminate gender bias in teaching and employment practices, and to study the effect of gender bias on litigation and other legal work.

E. CIVIL LITIGATION AND COURTROOM Demeanor

The chapter on civil litigation and courtroom demeanor was concerned with gender bias in the courtroom environment. In that regard, the committee focused primarily on judicial conduct because judges control or should control courtroom interaction. This focus included an examination of the duty of judges to intervene when other participants, such as attorneys or court employees, exhibit gender-biased behavior. The committee also considered the conduct of attorneys and the need for diversity in judicial appointments.

The committee determined that for gender bias to abate, judicial officers must refrain from any behavior reflecting gender bias and must regard the expressions of bias by others as intolerable. The judges must lead in articulating and accomplishing the goal of elimination of gender bias in the courts through setting a tone of fairness in the courtroom; appropriately responding to expressions of gender bias in the courtroom; controlling staff; reflecting impartiality in outside activities; ensuring neutrality in court appointments; using gender neutral language; and supporting diversity in judicial selection. Lawyers must follow the lead of the judiciary.

In its first major area of inquiry, judicial conduct, the committee found that upon occasion, gender bias by judges has resulted in judicial discipline by the Commission on Judicial Performance. The committee concluded, however, that many more examples of conduct exhibiting gender bias or the appearance of gender bias have occurred that have *not* resulted in judicial discipline. Examples of the kinds of conduct documented by the committee are occasional, openly hostile behavior; sexual innuendo or dirty jokes; use of terms of endearment to refer to women participants in the courtroom; failure to extend equally common courtesies to women participants, such as handshakes or appropriate forms of address; undue attention to the personal appearance of female court participants; reliance on stereotypes about women rather than upon judgments unique to each individual; adoption of a tone toward female participants that is fatherly, either courtly and patronizing or harsh and reprimanding; unequal extension of professional courtesies; imposition of unequal standards of advocacy; hostility and impatience toward causes of action usually involving women, such as sexual discrimination or harassment; imposition of penalties, such as denying continuances of trials or depositions, upon women participants who are pregnant when similar penalties would not have been imposed for another disabling condition; and failure to intervene appropriately when conduct constituting gender bias is exhibited by some other court participant under the judge's control, such as opposing counsel, a bailiff, or a court clerk.

Incidents of conduct evidencing gender bias by other judicial officers, such as commissioners and arbitrators, have also occurred. The committee found that conduct of judges and other bench officers constituting gender bias, even when the conduct would

appear relatively minor in its immediate effect, results in undermining the credibility of the female participant and generally impugning the integrity of both the judiciary and the entire judicial system. This result is exacerbated when the court employees who work under the direct supervision of the judge exhibit similar behavior. Finally, in the committee's view, judicial membership in clubs that practice invidious discrimination creates an appearance of impropriety and undermines the efforts of courts to achieve equal justice.

The committee made a number of recommendations aimed at reducing judicial conduct exhibiting gender bias. For example, the committee recommended adoption of a new section of the Code of Judicial Conduct that imposes the obligation upon judges to perform all judicial duties without bias or prejudice, to refrain from manifesting bias, and to prevent others under the judges' control from engaging in similar conduct. To ensure uniform enforcement of this duty, the Advisory Committee on Private Judges¹⁰ should consider extending it to private judges, and the State Bar should likewise consider its application to lawyers serving as judicial officers. The committee also urged that a fairness manual be prepared for judges, covering such issues as fair treatment of and appropriate behavior toward lawyers, jurors, court staff, experts, litigants, and others, and including a suggested opening statement to be read at the beginning of all court proceedings. The committee also called for creation of a pilot project in three counties to develop informal mechanisms for dealing with minor incidents of gender-biased conduct by judicial officers, attorneys, and court personnel. Finally, the committee felt that the applicable judicial canon should be clarified to provide that judges *shall not* belong to clubs that practice invidious discrimination.

In its examination of the conduct of attorneys, the committee found that examples of attorney conduct exhibiting gender bias abound, and the examples are both more frequent and more severe than those involving judicial conduct. Attorney conduct that exhibits gender bias noted by the committee included focusing on the sexual attributes or personal appearance of women participants in courtroom proceedings; using gender as a trial tactic; expressing the belief by word or deed that women should not be lawyers or are inferior as advocates; and discriminating against women in bar activities. The committee further found that some attorney conduct exhibiting gender bias is committed with the encouragement or participation of the judge, and that it occurs in a climate of decreasing civility in the profession.

The committee also determined that female attorneys are often excluded from the most lucrative and prestigious appointments as counsel in civil matters. In addition, the committee found that female attorneys generally perceive that they have fewer opportunities for advancement than do male attorneys, a situation directly related to the

¹⁰ This committee's work has been completed. Issues relating to the ethical duties of private judges would now be referred to the Supreme Court Advisory Committee on Judicial Ethics.

profession's failure to respond adequately to the difficulties of balancing home and family. Finally, in the committee's view, attorney membership in and business use of private clubs that practice invidious discrimination is detrimental to affected professionals, both women and minorities.

The committee made a number of recommendations aimed at reducing gender-biased conduct by attorneys and improving the plight of women lawyers. For example, the committee proposed that the State Bar adopt a rule of professional responsibility similar to the proposed canon for judges that would impose a duty on all attorneys not to manifest bias. In addition, the committee concluded that the State Bar should conduct a major, ongoing effort to educate the bar on issues of gender bias, including through the bar examination; should adopt a rule of professional responsibility prohibiting attorneys from discriminating in employment decisions or engaging in sexual harassment; and should use every available means permitted by the Constitution to discourage attorneys from using clubs that practice invidious discrimination for business purposes. The committee also called for changes in the courts, including requiring the use of gender-neutral language in all local court rules, forms, documents, and jury instructions, and adopting a model local rule on the appointment of counsel in civil cases to assure equal access for all attorneys regardless of gender, race, or ethnicity.

While it did not propose a recommendation relating to diversity in judicial appointments, the committee concluded that this issue was of great significance. The evidence reviewed by the committee in the area of litigation and courtroom interaction collectively pointed to one conclusion: substantial amelioration of the problem of gender-biased conduct in the courtroom would be accomplished if women were appointed to judicial office in numbers commensurate with their numbers in the legal profession and in society as a whole.

F. IMPLEMENTATION

After considering gender bias in five substantive areas, the committee looked to the future, to the means of implementing and institutionalizing the recommendations included in the report. In the committee's view, without the formation of an implementation committee, the likelihood that the recommendations would come to fruition was significantly lessened. Such a committee would be called upon to act as a liaison to other groups charged with the responsibility of carrying out specific recommendations, to draft and solicit comment on those proposals not referred to other agencies or committees, and to provide technical assistance and evaluation to all groups engaged in the enterprise of ensuring implementation of the committee's recommendations.

In 1991, former Chief Justice Lucas carried out the committee's recommendation to create an implementation committee, naming Associate Justice Ronald M. George

(current Chief Justice) to chair the Advisory Committee to Implement the Gender Fairness Proposals. Appointments to the Implementation committee included eight members of the Judicial Council; the chair of the original advisory committee, Los Angeles Superior Court Judge David M. Rothman; and its five subcommittee chairs. The duties of the implementation committee were ultimately transferred to the Judicial Council's Access and Fairness Standing Advisory Committee, chaired by South Bay Municipal Court Judge Benjamin Aranda III. The committee has a specific subcommittee devoted to completing implementation of the gender fairness recommendations. The subcommittee is chaired by Los Angeles Superior Court Judge Meredith C. Taylor, a member of the original gender bias committee and its family law subcommittee chair. A report describing progress on implementation is being published simultaneously with this final report of the advisory committee and is contained as a chapter in the Judicial Council's 1996 Annual Report.

G. JUDICIAL EDUCATION

A central theme of all the recommendations was judicial education. Widely perceived as fundamental to correcting gender bias, judicial education, the committee felt, must be enhanced, broadened, and encouraged. The committee offered specific recommendations for improvement, including integrating gender bias into the substantive areas of the law that are already taught, so that an educational program is not focused on gender bias alone; developing innovative and creative teaching techniques to counter judges' resistance to these issues; and including information from the social sciences where appropriate, so that judges profit from up-to-date research and gain an understanding of the different life experiences that men and women have in our society. The committee also concluded that, in certain specific areas, most notably in family law, the model of voluntary education must ultimately yield to required courses for all judges who hear matters in these crucial areas.

H. RACE AND ETHNIC BIAS

The committee's final chapter was devoted to the interrelationship between race and ethnic bias and gender bias. Issues confronting women of color were a special focus for the committee throughout its work, and were noted wherever appropriate in the report. Both the complexity and enormity of this problem, however, dictated the creation of a separate task force to study race and ethnic bias in the courts. The committee therefore included a recommendation for such a task force, with suggested areas of study. Appointed by former Chief Justice Lucas in 1991, the Judicial Council Advisory Committee on Racial and Ethnic Bias in the Courts has now conducted public hearings, has issued a summary of public hearing testimony, and expects to issue a report and recommendations in the fall of 1996.

V. CONCLUSION

After exhaustive study, the committee found that gender bias embedded in our cultural and political history is manifested as well in the decision-making and courtroom environment of the California judicial system. The committee members concluded that it is the special responsibility of the judiciary and the court system, which are charged with judging the conduct of others, to take immediate steps to eradicate this bias and minimize its effects. The committee's recommendations were offered in the spirit of fostering the public's trust and confidence in the judicial system, and of helping the California courts move into the 21st century as models of fairness for all citizens.

Chapter Two

Introduction

The members of the Judicial Council Advisory Committee on Gender Bias in the Courts were charged by former Chief Justice Malcolm Lucas with the duty of addressing gender bias in the California courts. After careful study, the committee found that serious problems exist in decision-making, court practices and procedures, the fair allocation of judicial resources, and the courtroom environment. To remedy these problems, the committee proposed a series of recommendations in the areas of family law, domestic violence, juvenile and criminal law, court administration, and civil litigation and courtroom demeanor. The committee also proposed recommendations for implementing reform measures and for developing judicial education programs on gender bias issues. The purpose of this introduction is to place the committee's conclusions in a historical and social context, to define gender bias, to justify the committee's focus on bias against women, to describe the committee's specific genesis and function, and to provide an outline of this report.

I. GENDER BIAS: THE HISTORICAL CONTEXT

The problems of gender bias found by the committee can be traced to our historical and cultural past. Women and men did not share equal status in this country from its earliest beginnings. The first two women came to the colony of Virginia in 1608; they were followed in 1619 by 90 others who were needed to create a more solid and lasting community in the new colony. As the colonies developed, women came in greater numbers, often as indentured servants or, in the case of many women of color, as slaves.¹ When women who were neither slaves nor indentured servants came to this country, they did not necessarily find freedom. As Eleanor Flexner noted in her history of the suffrage movement:

Whatever their social station, under English common law, which became increasingly predominant in the colonies and among all religious denominations (until the advent of the Quakers), women had many duties, but few rights. Married women in particular suffered "civil

¹ Flexner, *Century of Struggle: The Woman's Rights Movement in the United States* (1971), pp. 3–5.

death," having no right to property and no legal entity or existence apart from their husbands.²

It was not until August 26, 1920, when the proclamation certifying adoption of the Nineteenth Amendment was signed, that women even had the right to vote in this country. That event occurred only 76 years ago. The effects of this disenfranchisement linger, and no woman has yet been elected president or vice-president of the United States.

The consequences of women's political and civil inferiority were grave. They included the characterization of women as inferior, dependent, in need of protection, lacking in credibility, vindictive, overly emotional, and suitable subjects for domination and control.

Although gender bias is rooted in the not-so-distant past when women could neither vote nor own property, vast social change has occurred and is continuing to occur at a rapid rate. These changes have included, among others, the entry into the work force of many more women, the increased ability of men and women to plan their families, and the movement to establish equal rights for women and for racial and ethnic minorities.

Our times are now changing with such speed and explosiveness that it is incumbent upon the courts to keep pace with, even to be in front of, the changes that are surely coming. With the increase in the number of women in the work force, including as lawyers and judges, and with the changing demographic and economic trends, attitudes about women and men based on last century's ideas and values will no longer suffice.

Accordingly, this investigation has not focused on whether gender bias in the court system is slight or severe, or whether the foundations of our court system are structurally sound. Rather, the committee's purpose has been to provide the Judicial Council of California with a map that points out the pathways to a future where decision-making is based on individual qualities, not on stereotypes, on perceptions that men and women have equal worth and dignity that endure regardless of their cultural or racial identification, and on knowledge of the realities, both economic and social, that men and women face in their lives. While this report is critical of judges, lawyers, court clerks, and others in many respects, the committee considered its work to be essentially positive. By documenting issues and suggesting specific recommendations for change, the committee's work will enable the judiciary to travel into the 21st century with the appropriate tools.

² *Id.*, p. 7.

II. WHAT IS GENDER BIAS?

The advisory committee's working definition of gender bias was: behavior or decision-making of participants in the justice system that is based on or reveals (1) stereotypical attitudes about the nature and roles of women and men; (2) cultural perceptions of their relative worth; or (3) myths and misconceptions about the social and economic realities encountered by both sexes.

Gender bias, as defined by the committee, manifests itself in many different ways. Bias can be intentional and reflect ill will, as illustrated by the report of a judge who remarked that he would not take a family law assignment until the court got rid of the women lawyers. Such intentional bias is the easiest form of bias to understand and may also be the least frequent to occur.

Bias also includes disregard or insensitivity to the needs or characteristics of one sex or the other, such as rules that exclude children from the courtroom without making other provisions for them when abused women seeking restraining orders must come to court with their children. It includes differential treatment of the sexes that occurs when a judge is congenial and courteous to a male attorney and refuses to make eye contact with the female opposing counsel. Or, bias may amount to treatment that is unequal because it fails to acknowledge immutable differences, such as the need for pregnancy leave or the placement of female juveniles in painful shackles unsuitable to the female anatomy. Finally, bias can be seen in court procedures and policies that have a disparate impact on one class of persons. For example, such bias occurs when child support guidelines are applied as a ceiling rather than a floor as the Legislature intended, to the detriment of the children and the custodial spouse, who is most often a woman.

Manifestations of gender bias are often subtle and difficult to discern. What is more, the path to understanding and overcoming bias can be blocked by a series of obstacles. The first obstacle to a judicial understanding of bias is personal resistance. Sometimes judges fail to take the issue of gender bias seriously because it implies a lack of impartiality, an implication that is difficult for judges to accept. Judges may not understand or may ignore the life experiences of those whose lives are very different from their own. This attitude may lead to trivializing or devaluing issues that uniquely affect one sex or the other. Thus, some judges do not treat domestic violence as a crime even when the level of violence is severe. Spousal abuse is seen rather as a subject for counseling and diversion, a family squabble into which the court should not intrude.

Another obstacle to recognizing bias and changing behavior based upon it is the rapid and far-reaching social change that has overtaken our political and social institutions. What was once accepted behavior is no longer acceptable. What was once chivalrous or courtly behavior is now patronizing, for example, when the behavior

relates to women professionals in the courtroom. We therefore see male judges responding negatively to female attorneys they perceive as too aggressive. Such judges query, "Why can't they act like women; why must they act like men?" when in fact the women are only acting like lawyers.

Social change in general has been accompanied by a similar change in the judicial role. Courts have become busier and larger. They require management. Bar leaders have begun to recognize a serious decline in lawyers' civility in the courtroom. In this context, a judge has a duty to control the courtroom environment in ways that were not expected of judges in earlier times and to intervene when others exhibit bias. These changes in the judicial role have been occurring while judges have remained relatively isolated professionals, even from their peers. Coupled with this isolation is the enduring characteristic of judges: they are the ones in charge, and they wield great power over people's lives. In some areas of the law, such as family law, judges have broad discretion, the appeal rate is low, and to a great extent the judges' views, be they fair and neutral or affected by deeply held personal beliefs, become the law of the case.

Juxtaposed against these characteristics of the judge's role, both changing and enduring, is a horizon of scarce and dwindling resources. More is being asked of judges who have less time, and fewer dollars are available to administer the courts. This lack of resources could be offered as an excuse or justification for some of the manifestations of bias. Yet, the advisory committee determined, it is important to ask questions, especially in a time of scarce resources, about where and how those resources are allocated and who is paying the price. Family lawyers, for example, consider their field to bear a disproportionate burden of insufficient resources, making fair and efficient decision-making even more difficult.

III. FOCUS ON BIAS AGAINST WOMEN

Presumably, a study of gender bias in the courts should include a discussion of the issues for both sexes. The advisory committee generally agreed with this proposition and addressed bias against men when it was shown. The fact is, however, if one excludes racial and ethnic biases that most certainly affect men, problems of gender bias in the courts do not create specific disadvantages for men, with a few notable exceptions.³

There are several salient reasons gender bias has its most pernicious impact on women. First, historically, white men have held positions of power—not inferiority.

³ For example, in custody disputes men battle stereotypes that consider them strong, credible, and independent, but not capable of nurturing small children. Or, older male children, especially if they are members of a racial or ethnic minority, may be difficult to place in adoptive families because of stereotypes that associate violence and disruptive behavior with young men.

They have voted, held office, and owned property. They have not been excluded from professions, and they have not been economically disadvantaged solely because of their sex.

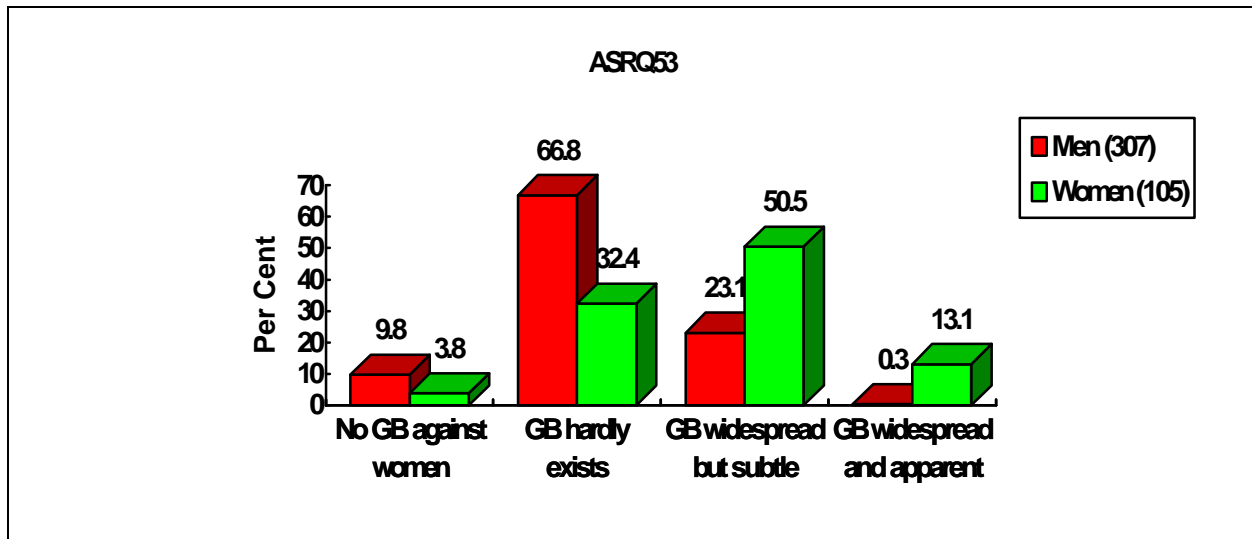
Second, stereotypes associated with white men do not connote dependence, a lack of credibility, or the absence of power. To the contrary, men are stereotypically viewed as powerful, credible, and independent. In considering the role of men as lawyers in the courtroom, these stereotypes help to bolster a man's image as a lawyer. In addition, because men are often physically stronger, they are not usually victims of domestic violence, although certainly some women do act violently toward their spouses or companions. And because white men have economic ascendancy in our culture, they do not usually receive spousal support or child support.

Third, except in the area of child custody, the committee did not receive evidence of bias against men. While men participated extensively in the information-gathering phase of the committee's work, they did not speak about bias against men. Except in the area of custody, none of the witnesses at the public hearings or the regional meetings addressed bias against men in the courts.

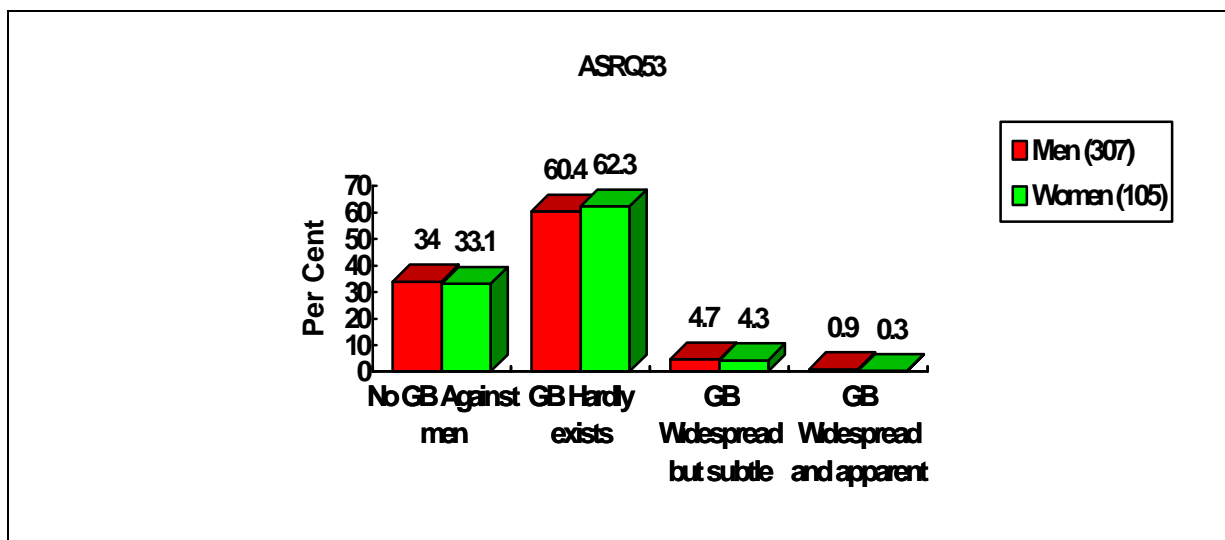
In general, judges as well did not identify bias against men as a widespread problem in the courts. Judges were asked two questions on the Judges' Survey relating to their perceptions about gender bias against women and men. The results show that only 4.6 percent of the female judges and 5.6 percent of the male judges agreed that gender bias against men is widespread and either apparent or subtle. The remaining large majority, 95.4 percent of the female judges and 94.6 of the male judges, perceived either no bias against men or believed it hardly exists.⁴ Thus, the Judges' Survey corroborated the need to focus this report on gender bias against women. Graphic depictions of the judges' responses appear below.

⁴ As the responses demonstrate, male and female judges tended to agree about their perceptions of bias against men. On the other hand, when bias against women was examined, men tended to see the problem as one that occurred much less frequently than did women.

ASRQ53 Which of the following statements best describes your overall perception of gender bias against women in the California courts?



ASRQ54 Which of the following statements best describes your overall perception of gender bias against men in the California courts?



For all of these reasons, the examples, testimony, and discussion in this report will principally address the disadvantages faced by women in the court system due to their sex. Whenever the committee received testimony or other information relating to the disadvantages faced by men in the court system due to their sex, those instances will be discussed.

Although the committee's inquiry did not reveal bias against men as a widespread problem in the courts, the committee concluded that bias against women hurts men as well. Both men and women have a special interest in ensuring that gender bias is no longer present in decision-making and in the courtroom environment. Men who testified at the regional meetings and public hearings revealed a sincere commitment to examining these issues and supported the view that bias against a particular group ultimately harms the entire system.

IV. THE GENESIS AND DEVELOPMENT OF THE ADVISORY COMMITTEE

A. APPOINTMENT OF PRECURSOR COMMITTEE

On July 15, 1986, then Chief Justice Rose Elizabeth Bird appointed a special committee of Judicial Council members to review issues of gender bias in the California court system. The committee's formation was inspired in part by the active interest in issues of gender bias demonstrated by persons and organizations in California and the states of New York and New Jersey. The original Judicial Council committee was chaired by now retired Justice Elwood Lui of the Court of Appeal for the Second District, Division Three, and was charged with (1) reviewing specific suggestions for changes in court practice and procedure designed to assure equal treatment for men and women in the court system; and (2) reporting its recommendations to the full Judicial Council.

Based on an extensive review of proposals pending in California, New York, and New Jersey, the original committee developed eight recommendations to the Judicial Council for suggested changes and for further study. The recommendations addressed a number of issues, including:

1. judicial education;
2. training conducted by the Administrative Office of the Courts (AOC);
3. a Standard of Judicial Administration setting forth a judge's duty to refrain from and prevent conduct exhibiting bias in the courtroom;
4. a Standard of Judicial Administration on courthouse waiting rooms for children;
5. a Standard of Judicial Administration on the use of gender-neutral language in local rules, forms, and documents;
6. review by the AOC of all statewide rules, standards, and forms to assure the use of gender-neutral language;

7. formal transmittal of reports from New York and New Jersey to other state agencies; and
8. further study of gender bias issues by an advisory committee.

In accordance with the Judicial Council's usual practice, a preliminary report summarizing the eight proposals was circulated for statewide comment in September 1986. The committee's final recommendations were modified slightly and, as modified, were adopted by the full council in December 1986.

B. IMPLEMENTATION OF ORIGINAL COUNCIL PROPOSALS

The following actions were taken after the December 1986 meeting, pursuant to the recommendations adopted by the Judicial Council:

1. A letter was transmitted to the California Center for Judicial Education and Research (CJER) from the Administrative Director of the Courts. The letter commended CJER for its educational programs on fairness and urged expansion of those programs to include specific gender bias components at the substantive law institutes, orientation programs, and the Judges' College.
2. A gender bias component was included in CJER's Family Law Institute in March 1987.
3. A gender bias component was included in the workshop conducted by the AOC in April 1987 for presiding judges and court administrators.
4. Copies of the newly adopted Standards of Judicial Administration and a manual on how to establish a children's waiting room, prepared by Judge Alice A. Lytle of the Sacramento Municipal Court, were distributed to the courts in January 1987.
5. Copies of the New York and New Jersey gender bias reports were mailed, with letters of explanation, to the Commission on Judicial Performance, the Attorney General, the State Bar of California, the Committee of Bar Examiners, and the dean of each law school registered with that committee.

C. APPOINTMENT OF ADVISORY COMMITTEE

On January 2, 1987, pursuant to Government Code section 68501, then Chief Justice Bird appointed 27 members to the Judicial Council Advisory Committee on

Gender Bias in the Courts. Justice Elwood Lui of the Court of Appeal for the Second Appellate District, Division Three, and Senator Diane E. Watson of the Twenty-eighth Senate District were named co-chairs. Thereafter, former Chief Justice Malcolm M. Lucas appointed two additional members in March 1987, and four additional members in September 1987. At the same time, Chief Justice Lucas also named Los Angeles Superior Court Judge David M. Rothman as co-chair to replace Justice Lui, who retired and returned to private practice. Justice Lui remained a member of the executive committee and the full committee. Los Angeles Superior Court Judge Judith C. Chirlin was selected as vice-chair. Chief Justice Lucas also selected Dr. Norma J. Wikler, a recognized expert in the field with substantial experience in other states, to serve as an advisor and consultant to the committee.

As so constituted, the committee was charged with conducting a comprehensive review of gender bias issues, consistent with the scope of the Judicial Council's authority, with special focus on the following topics:⁵

- judicial branch employment practices;
- gender bias within the judiciary;
- selection of court-appointed counsel;
- jury instructions;
- domestic violence;
- custody;
- child support;
- economic consequences of dissolution; and
- family law education and assignment procedures.

The council further authorized the advisory committee to:

- consult with other professionals in the justice system;
- conduct public hearings, regional meetings, and surveys;
- collect statistical information; and
- perform any other tasks consistent with the Judicial Council's authority and the committee's charge.

D. THE NATIONAL PERSPECTIVE

It is important to note briefly that the advisory committee did not function in isolation while considering problems of gender bias in the courts. The Conference of

⁵ A committee roster is contained in this report at Appendix A, and a full description of the information-gathering techniques used by the advisory committee is contained in a separate chapter on methodology.

Chief Justices in 1988 called for the creation of task forces on both gender bias and racial and ethnic bias in every state. Then in May 1989, a national conference on gender bias issues was conducted by the National Center for State Courts. By 1990, there were approximately 29 committees or task forces studying gender bias in other states. Nor is the study of the problem of gender bias limited to state courts. Judicial education on gender bias is well under way in the courts in Canada, and the Federal Study Committee has recommended such education for the federal bench.⁶

E. SPECIAL FOCUS ON GENDER BIAS AND RACIAL AND ETHNIC BIAS

In recognition that other equally troublesome and pernicious biases in our culture exist and affect court proceedings, and in recognition of the changing demographics in California, the advisory committee designated the issue of the interaction between gender and racial and ethnic bias as an important area of inquiry. Throughout this report, wherever possible and relevant, the committee discussed this special focus issue. The committee recognized, however, that problems of racial and ethnic bias were not expressly included in its charge, and that consideration by a separate committee was crucial to fully document this issue. The committee has discussed race and ethnic bias throughout this report, and has devoted a separate chapter to outlining areas for further study of this important issue. Such consideration is ongoing.

V. OUTLINE OF THE REPORT

As described more fully in the methodology chapter, this report resulted from three years of intense and collaborative effort by members of the advisory committee working with AOC staff. The committee conducted its work through subcommittees on the substantive law topics being considered: family law, domestic violence, juvenile and criminal law, court administration, and civil litigation and courtroom demeanor. At the report writing stage, each subcommittee chair worked with subcommittee members and AOC staff to produce a description of the need for the recommendations in that particular area of law. The result was a document reflecting a finely honed consensus on sometimes controversial issues.

When released for comment in March 1990, the draft report was essentially a compilation of the various subcommittee reports. Generally, each subcommittee report, or chapter, followed a similar format: a summary description of findings, followed by a recommendation, followed by a discussion and analysis. However, because this

⁶The Ninth Circuit Court of Appeals issued a comprehensive report on gender bias in that circuit in July 1993. See *The Effects of Gender in the Federal Courts: The Final Report of the Ninth Circuit Gender Bias Task Force* (1993). Other federal circuits are undertaking similar endeavors. See Weinstein, *Limits on Judges Learning* (1994) 42 Arizona L. Rev. 539, 542, note 8 (citing *Joint State-Federal Task Forces Study Problems of Gender Bias in Courts* (March 1994) State-Fed. Jud. Observer, p.1).

document had not one author, but many, some chapters do not specifically delineate findings; others do but place them after the recommendation.

In updating this report for final publication, the editors determined that it should continue to be presented as a collection of subcommittee reports. Such a presentation preserves the approach of the various authors and honors their hard work. At the same time, wherever possible, the editors attempted to unify the style and provide as much consistency as possible.

As in the draft report, this report begins with a description of the methodological approach and then turns to the five substantive chapters. The report concludes with a discussion of implementation and judicial education and a look at the special focus area of gender and racial and ethnic bias. Following a brief conclusion, the report appendices contain the committee roster and fact sheet, the Chief Justice's speech at the first meeting of the committee, copies of various survey instruments, and other information-gathering devices.

The process of self-scrutiny represented by this report has been both necessary and healthy. Such an undertaking is rarely conducted by any institution. It is most fitting that those who sit in judgment over others have been willing to look inside their own house, the one we call the courthouse, and voluntarily undertake a process of introspection and serious consideration of proposals for change.

Chapter Three

Methodology

I. INTRODUCTION: THE METHODOLOGICAL APPROACH

The findings, conclusions, and recommendations in this report have been supported by data generated through a wide range of information-gathering techniques. These techniques were analyzed and reviewed by advisory committee members and, in select areas, by outside social scientists. By the completion of the data-gathering phase, the advisory committee had reviewed approximately 3,500 pages of hearing transcript, 200 letters of comment, hundreds of articles, a number of meeting summaries, and all of the survey results and reports. The fact that these diverse sources of information proved to be mutually corroborative gave the committee added confidence that its documentation of gender bias in the California courts was both accurate and comprehensive.

The primary technique for gathering data, described more particularly below, was to consult with and receive testimony from a wide spectrum of knowledgeable and credible people across the state about their experiences in the courts. Judges, attorneys, domestic violence workers, mediators, clerks, litigants, and others who work at every level of the justice system related their views of the California court system in rural and urban areas, and in large and small courts. The Judges' Survey was a most reliable source, especially in light of the high response rate of 73.9 percent. The report relies heavily on a collection of mutually corroborative expert opinions, a methodology used by lawyers and judges every day in cases pending throughout the state.

The advisory committee's approach was consistent with that used by gender bias task forces across the country. Like those task forces, the committee obtained the perspectives of a cross-section of the state's justice system participants. Moreover, the committee's method of information gathering was especially suited to this field. Canon 2 of the California Code of Judicial Ethics requires judges to avoid both impropriety and the *appearance* of impropriety in all their activities. As such, the views and impressions of the public and of those who work in the justice system are highly relevant to the gender bias inquiry.

In sum, the committee pursued a methodological approach that was uniquely appropriate to its distinctive mandate. Gender bias, as with all biases, is elusive. It is rarely manifested in objective forms that can be weighed or measured. To outline the contours and parameters of bias, an investigating body must rely on many sources of information. No single data source is sufficient. Piecing together diverse kinds of data not only begins to build a composite picture of the many aspects of bias, but also serves to corroborate the information already gathered. Each piece of the picture refines our understanding of what gender bias is and how it operates.

II. THE METHODOLOGICAL CONSTRAINTS

Each state that seeks to examine the question of gender bias starts with its own data base of statistical information. In California, statistics are simply not available in most fields, probably because the docket is so large and the cost of recovering information is so high. For example, the Statewide Office of Family Court Services had not yet instituted a uniform statistical reporting system in family law at the time the committee gathered its data. Early on in the process, the committee acknowledged that this hurdle was not possible to overcome given existing resources.

This lack of statistics, especially in the area of family law, is a problem throughout the country. The unavailability of relevant, retrievable statistical data was acknowledged at the first national gender bias conference conducted by the National Center for State Courts as a difficult challenge for those investigating gender bias in the courts.

Because of the lack of statistical information, the advisory committee recommended collecting information in some fields. If the committee believed that "hard data" was needed to document gender bias, then it adopted a recommendation in that regard. For example, family law research and statistics are the subject of one recommendation, and statistical reporting of the appointment of counsel is the subject of another. In recommendations such as these, the implementation committee has been charged with gathering statistical information to define more precisely the extent to which gender bias operates and to monitor its continuing existence or amelioration.

III. INFORMATION-GATHERING TECHNIQUES

The advisory committee used the following methods of gathering information about the problems of gender bias in the California courts:

- A survey of California judges
- Confidential regional bar meetings
- Public hearings

- Site visits to two jail facilities
- Focus-group discussions with judges, civil litigators, family lawyers, and minority attorneys at the State Bar Annual Meeting in September 1988
- Information-gathering meetings with domestic violence advocates
- Meetings with and surveys of court clerks
- Reports submitted by participants at the Conference of Affiliates of California Women Lawyers on practices in various counties relating to domestic violence diversion, attorneys' fees in family law matters, alternative sentencing and dispositional programs in criminal and juvenile law, and the appointment of counsel in juvenile and criminal matters
- Extensive literature and case law searches in the fields of concern to the committee
- An invitation to submit written comments published in *California Lawyer*
- Followup telephone interviews with participants

A more detailed description of these sources follows.¹

A. A SURVEY OF CALIFORNIA JUDGES

1. A GENERAL DESCRIPTION OF THE SURVEY

Because this is a study of gender bias in the courts, the advisory committee determined that the resources available for outside research would be best used by obtaining information on the views and decision-making patterns of judges. To ensure that the highest standards of social scientific survey research would be met, the committee contracted with Applied Survey Research (ASR), a highly regarded, nonprofit organization based in Santa Cruz, California, to work with the staff of the Administrative Office of the Courts in designing and implementing a survey.

In order to invite the widest possible commentary and opinion, all judges and commissioners in the State of California, a distribution total of 1,737, were sent the survey questionnaire along with a letter from former Chief Justice Malcolm M. Lucas. For purposes of analysis, however, a sample of 575 was drawn from this larger list. This sample size ensured that there would be sufficient resources of time and personnel to follow up on nonresponders, thereby achieving a response or "completion" rate high enough to permit generalizations regarding the attitudes and practices of judges in

¹ Although the information provided by witnesses who attended the various hearings described in this chapter was often referred to as testimony, it was not provided under oath.

general. A pretest was conducted of approximately 15 judges who commented on a draft survey instrument and helped the committee refine and clarify the questions.

2. SAMPLE PLAN AND METHOD

This sample of 575, referred to in this report as the *entire sample*, consisted of the following elements:

1. A *representative or probability sample* of 434 (also referred to as a "systematic random sample") composed of every fourth name on the population list of all judges and commissioners;
2. An oversample of 13 sole judges (all sole judges of superior courts not already included in the representative sample);
3. An oversample of 59 family law judges (all family law judges not already included in the representative sample); and
4. An oversample of 69 female judges (every second female judge not already included in the representative sample).

Oversampling was used to increase the number in the entire sample of three types of judicial officers who otherwise exist in relatively small numbers in the population as a whole: sole judges, family law judges, and female judges. While these three groups were included in the representative sample in direct proportion to their numbers in the population of judicial officers as a whole, the oversamples increased the final yield of these three groups. This increased or enriched sample made the groups large enough to permit the examination of differences between them. For example, by using the entire sample, which can be separated according to gender, comparisons can be made between male and female judges.

In this report, unless otherwise indicated, the sample statistics given are those for the *representative sample* (i.e., the sample consisting of every fourth name on the population list of all judges and commissioners). This is the correct statistic to use when one is describing the opinions, perceptions, or experiences of California judges as a whole (e.g., what percent of all judicial officers in California favor X? endorse Y? have observed Z?). In instances where groups of judicial officers are compared to one another (male judges to female judges; family judges to all others), the statistics are drawn from *the entire sample* which, as noted before, contains the oversamples of the three special groups.

The distinction between the use of the different samples is crucial. The committee did not wish to skew the results of the survey to reflect the views of, for example, women judges or family law judges. Thus, most references to the survey data are to the representative sample, which was randomly selected and did not over sample any one group. Only when differences between the two genders or between family law and other judges were of interest did the committee use the over sample.

When reviewing the survey results and comparing the responses of different groups of judges, it was necessary to determine whether or not the difference found in the sample was great enough to conclude that a similar difference existed in the population of judges as a whole. The "chi square" is the statistical test most commonly employed for this purpose. By convention, statisticians and social scientists accept as "significant" any significance value less than 0.05. This allows the researcher to be at least 95 percent confident that generalizations from a sample correspond to the population as a whole. In this report, only those differences in responses between groups of judges that are *statistically significant* will be presented.

3. THE RESPONSE RATE

The response or completion rate in a survey is extremely important, as it strongly affects a researcher's confidence that a sample reflects the population accurately. In the present survey, the overall response rate was 73 percent, or 1,268 completed questionnaires, out of a total population of 1,737 judges and commissioners. Of the 575 individuals in the entire sample, 425 completed questionnaires were received, for a response rate of 73.9 percent, which is considered high by the standards of the field.

4. WHAT THE SURVEY YIELDED

The survey provided the advisory committee with extensive information on judicial opinions and decisions in the courts during the preceding three-year period. In addition, the survey produced data concerning the aspects of gender bias judges deem most important for judicial education and the appropriateness of a host of possible remedies for the problem. The survey also uncovered a number of statistically significant differences between female and male judicial officers. The survey showed that gender strongly affects judges' experiences, views, evaluations, and preferred remedies pertaining to gender bias in the courts.

B. CONFIDENTIAL REGIONAL BAR MEETINGS

A series of six confidential regional bar meetings for California attorneys were conducted January through March 1988 in Butte, Sacramento, San Francisco, Orange, Fresno, and Los Angeles Counties. From 30 to 50 attorneys attended each meeting, except in Sacramento, which had approximately 15 attendees. The meetings were held

over several hours so that attorneys could drop in as their schedules permitted. In addition, the meetings often extended into the evening hours so that attorneys could attend after the close of business. Approximately 200 attorneys testified statewide. Most of those who testified were women, but several men testified at each meeting as well.

The witnesses were given an opportunity to speak confidentially about their personal experiences with and observations on gender bias in the courts. Written questions were distributed in advance to generate discussion. The questions reflected preliminary areas of concern to the committee and provided a framework and stimulus for thinking. Some attorneys sent written communications, which were read by others, either because the witness was unavailable or feared identification or reprisal.

Panels from the advisory committee attended each meeting, and the proceedings were transcribed. No judge member of the advisory committee attended a confidential bar meeting in his or her jurisdiction.

The special feature of this information-gathering technique was that it provided an opportunity to canvas the bar about the issue of gender bias in a setting that fostered discussion and openness. Generally, reports from different areas of the state were consistent. Two aspects of the meeting were particularly striking: the candor of the witnesses and their obvious respect for the judiciary.

C. THE PUBLIC HEARINGS

Five public hearings were conducted in Los Angeles, San Diego, San Francisco, Sacramento, and Fresno from January to April of 1989. The public hearings were designed to solicit comments from participants in the justice system. The hearings were conducted from 11 o'clock in the morning into the evening hours to permit working people to attend. They were publicized and open to the press. Expert testimony was solicited in advance and scheduled. "Open mike" periods were also scheduled to permit members of the public to speak. Approximately 25 experts were scheduled at each meeting and from 5 to 15 members of the public participated at each meeting as well. In all, approximately 150 witnesses participated in the hearings. Other members of the public and the legal community attended, but did not testify. The hearings were transcribed.

The public-hearing witnesses possessed a wide range of expertise in the areas of concern to the committee. Witnesses included judges and presiding judges, attorneys and bar leaders, citizens and litigants, and others who work at every level of the justice system, including clerks, court administrators, social workers, mediators, psychologists,

and law enforcement officers. Witnesses often submitted written testimony and bibliographies along with their oral testimony.

Unlike the confidential bar meetings, the hearings did not focus on anecdotes about judicial misconduct or courtroom incidents of gender bias. Instead, much of the testimony was analytical—the witnesses observed patterns of behavior; their comments were substantive; and they discussed decision-making and suggested remedies.

The committee made no attempt to determine the merits of remarks submitted by litigants, and relied on this testimony only in a very limited way, as suggesting public perception of the problem. Although the committee did not analyze the specifics of the individual claims, this kind of testimony did establish a public perception on the part of many litigants that they were mistreated by the court system because of their gender.

D. SITE VISITS TO TWO JAIL FACILITIES

A panel of committee members visited Sybil Brand Institute for Women in Los Angeles. Sybil Brand, built for 900 persons, housed 2,300 women at the time of the visit. The committee members talked to over 150 women who attended parenting classes conducted at the jail. The committee members attended the classes themselves, and asked the incarcerated women a series of questions relating to vocational training, medical care and other special needs, and interactions with the dependency court. The inmates were invited to write their thoughts down on paper and submit them to the committee members. Inmates were not permitted to discuss the details of criminal matters leading to their incarceration.

A separate panel of committee members, with some overlap in attendance, visited Miraloma, a women's honor jail in Los Angeles. Approximately 30 women were interviewed at Miraloma.

These site visits produced a wealth of information about conditions for incarcerated women. The most significant areas of concern these women expressed were separation from their children and the difficulties they knew awaited them in being reunited with their families.

Committee members also interviewed teachers and other staff members at the prison facilities. The information provided by the staff corroborated much of the women's testimony. These visits were made with the full cooperation and assistance of the warden and her staff, who facilitated the visits and information-gathering process.

E. FOCUS-GROUP DISCUSSIONS AT THE STATE BAR

Four focus-group discussions were conducted at the State Bar Annual Meeting in September 1988. The discussions were conducted by separate panels of committee members and groups of judges, civil litigators, family law specialists, and leaders of minority bar groups. The advisory committee invited a cross-section of opinion leaders in these four groups to attend. Each focus group consisted of from 10 to 15 experts and from 3 to 5 committee members. The discussions usually lasted from two to three hours, and in some cases the participants stayed on into the lunch hour or late afternoon. Written lists of discussion questions were mailed to each group in advance.

The focus groups had several advantages. The committee used this forum as a laboratory to test the accuracy or advisability of potential remedies and preliminary committee findings. The participants provided the committee with further refinement, corroboration, and feedback, and provided an opportunity to debate certain questions with thoughtful leaders and experts. This was not possible at other meetings or hearings. The committee was also able to gain more knowledge about judges' and attorneys' views on certain issues and to analyze some of the information already gathered. Finally, the focus groups allowed the committee to determine whether a proposed remedy inadvertently created unforeseen problems or unintended results in the area of expertise of the focus group. The focus group for minority bar leaders was particularly valuable as a source of information about the concerns of minority attorneys in California.

F. MEETINGS WITH DOMESTIC VIOLENCE ADVOCATES

Members of the subcommittee on domestic violence conducted three meetings with members of three regional coalitions against domestic violence. These coalitions represented battered women's shelters and services provided throughout the state. The meetings were conducted in Los Angeles, Fresno, and Vallejo in the fall of 1988. A range of 15 to 20 domestic violence lay advocates, attorneys, and victims attended these meetings. Written testimony was also submitted from a fourth coalition, the California Women of Color Coalition Against Domestic Violence. The coalition meetings and written testimony provided the advisory committee with first-hand accounts of the experiences battered women have in attempting to use the courts to obtain protection from the violence they face. Space would not permit the committee to repeat the experiences of all of the women who testified. Their stories were poignant and at times overwhelming in ways that this report cannot fully convey. In no other area was the committee able to obtain so much information directly from the people the courts are attempting to serve.

G. MEETINGS WITH CLERKS

In July 1988, court employees from around the state who participated in an Administrative Office of the Courts (AOC) workshop entitled "Developing Management Skills" were invited to attend discussion groups on gender bias issues conducted by the Subcommittee on Court Administration. The employees who attended the discussion groups and others at the AOC conference completed a questionnaire on employment practices and gender bias in the court work environment. In October 1988, municipal court clerks attended a subsequent conference and were invited to participate in a drop-in roundtable discussion led by subcommittee members on gender bias issues arising in the court workplace. These attendees completed a slightly modified questionnaire.

Approximately 10 persons attended each discussion group. The discussion groups were sparsely attended, in part, committee members were told, because some clerks were uncomfortable with the subject matter or feared that their superiors would object to their attendance. The major issues raised by clerks at these sessions were: opportunities for advancement and training, child care, and sexual harassment.

H. SURVEY OF COURT EMPLOYMENT PRACTICES

In March 1989, the subcommittee on court administration prepared a comprehensive survey about employment practices in the courts. Every court in the state received a survey and a request for written materials about court policies on affirmative action, sexual harassment policies and training, and pregnancy and parenting leave. The survey responses were supplemented by a review of the more detailed written materials. Followup interviews were conducted in the spring of 1989 with representatives from six courts: Alameda Superior Court, Monterey Superior Court, Placer Superior Court, Ventura Municipal Court, Stanislaus Municipal Court, and Santa Cruz Municipal Court. Court executives, court clerks, and presiding judges were interviewed.

I. REPORTS SUBMITTED BY AFFILIATES OF CALIFORNIA WOMEN LAWYERS

Various women's bar associations affiliated with California Women Lawyers compiled information from several counties on issues of concern to the committee. The committee needed information on the availability and accountability of domestic violence diversion programs, the practices in various jurisdictions of awarding attorney's fees in family law matters, the availability of alternative sentencing programs or dispositions, and procedures and policies for the appointment of counsel. Each project participant used standardized interview sheets and provided a report to the committee. This information-gathering technique was not used to obtain statewide patterns and practices because participation was limited in some areas and included only

a few counties in some instances. Rather, the information gathered served to corroborate anecdotal information received from other sources.

J. LITERATURE AND CASE LAW SEARCHES

The advisory committee conducted an extensive literature search in the areas covered by this report. Research from other states, scholarly articles on substantive law, court administration, scholarly disciplines other than law, and relevant case law were reviewed comprehensively by the committee. Although secondary to the testimony received by the committee, this research often served to confirm the assertions of witnesses or to show that a problem revealed in California was recognized nationally. The advisory committee also reviewed the gender bias reports available from other states.

K. INVITATION TO COMMENT IN *CALIFORNIA LAWYER*

Over 200 comments were received in response to a request for comments published in *California Lawyer* in July of 1988. The request contained specific questions on the issues of concern to the committee. Attorneys who were unable or chose not to testify at the regional meetings or public hearings could submit testimony in writing. The responses came from all over the state and from both urban and rural areas. Many of the responses were anonymous.

L. FOLLOWUP TELEPHONE INTERVIEWS

The advisory committee's general policy was to followup testimony of all kinds with telephone interviews whenever possible. Thus, staff conferred with judges and attorneys who attended the focus groups both before the group meeting and afterwards. Public-hearing witnesses were often consulted again by telephone for their views on a particular remedy or recommendation. This procedure ensured that testimony was not misunderstood and gave the advisory committee an opportunity to deepen its understanding of the issues.

Chapter Four

Civil Litigation and Courtroom Demeanor

I. INTRODUCTION

For all who participate in court, but most especially for those who participate as litigants and witness, the appearance of justice is as important as justice itself. When the courtesy, the civility, the respect for all participants are preserved in a courtroom, then equal justice, and certainly the appearance of justice, can be achieved. But justice will continue to elude court participants and our communities if we see courtrooms in which judges are engaging in overt and subtle forms of gender-biased conduct, as attorneys, litigants, and court personnel have reported to the advisory committee.

The committee has heard even more serious complaints of gender-biased conduct by lawyers. In the final analysis, a judge is simply a former law student and a former lawyer. A judge often reflects the accepted social and ethical rules of the legal culture. If that culture regards expressions of bias as improper—not just from the moment robes are donned but from the beginning of a lawyer's career—then it is likely that judges from such a background will be intolerant of bias and will ensure participants in the court system equal justice under the law. If, on the other hand, judges fail to prohibit the kinds of blatant and serious attorney misconduct reported to the advisory committee, and the State Bar fails to take steps to eradicate this behavior, equality between men and women in the courts will remain an illusion.

Achieving full equality in the courts requires more than reforming judicial and attorney behavior. Court employees who act under the court's direct supervision and control must also refrain from gender-biased conduct. At the same time, these employees must themselves be protected from biased behavior in their work environment.

A number of other steps must be taken as well. Proceedings should no longer be conducted in courtroom environments where the very language used ignores or demeans women. Outside of our courtrooms, judges should not create the impression that they lack impartiality by choosing to belong to clubs that practice invidious discrimination, and attorneys should not use the premises of discriminatory clubs for business purposes. Finally, Californians are entitled to be judged by a diverse judiciary reflective of the numbers of qualified men and women in the legal profession and in our communities.

II. CHAPTER OVERVIEW

This chapter discusses problems of gender bias in civil litigation and courtroom conduct and proposes specific remedies for their resolution. The recommendations in the pages that follow are directed toward judicial officers, courtroom staff, and litigators. As the recommendations make clear, for gender bias of any kind to abate, judicial officers must regard expressions of such bias as intolerable. The judges must take the lead in eliminating gender bias in the courts through setting a tone of fairness in the courtroom, appropriately responding to expressions of gender bias in the courtroom, controlling staff, reflecting impartiality in other activities, ensuring neutrality in court appointments, using gender-neutral language, and supporting diversity in judicial selection.¹

The foundation for all of these steps will be judicial education, the essential cure for the ills of gender bias. Every effort must be made to remedy ignorance of gender bias and to correct false perceptions. Toward that end, the information contained in this chapter can be used in developing curriculum and materials for judicial education programs on civil litigation and courtroom demeanor. The general subject of judicial education is treated in depth in a subsequent chapter that includes specific recommendations on how to develop judicial education programs on gender bias.

III. METHODOLOGY

The regional bar meetings were the most important method used by the civil litigation and courtroom demeanor subcommittee to gather information on gender bias. While some of the regional meeting anecdotes may have reflected personal animosity toward a judicial officer or attorney or may have been rooted in the disappointment caused by losing a case, the reports were too frequent to be discounted and followed an identifiable pattern from county to county. The witnesses were respectful of the process and sometimes almost apologetic about their reports. Many witnesses were local bar leaders with reputations for truth and veracity in the community. The advisory committee found the witnesses credible in most instances.

The committee relied on other sources as well. The public hearings yielded significant and relevant testimony on possible remedies for biased courtroom conduct. In addition, focus groups conducted at the State Bar Annual Meeting in 1988 for civil litigators and judges were invaluable sources of information. At these focus groups, proposed remedies were debated and analyzed, and distinguished litigators and trial judges corroborated the information supplied by local attorneys at the regional bar meetings. The Judges' Survey was a vital tool for determining judicial views on gender

¹ An entire chapter of this report has been devoted to the ways in which the combination of gender and ethnic and racial bias affects litigation and courtroom demeanor, as well as other areas of the law.

bias in courtroom demeanor and the remedies for correcting it. Finally, the committee conducted a comprehensive search of case law on judicial conduct and reviewed literature on civil litigation, courtroom demeanor, discriminatory clubs, the employment of women lawyers, and the judicial selection process. The committee found an in-depth survey of California women lawyers conducted by the State Bar Committee on Women in the Law to be especially informative. These disparate sources—confidential attorney meetings, public hearings, small discussion groups, surveys, and a literature search—provided the committee with reliable information on which to base its recommendations.

IV. FINDINGS, RECOMMENDATIONS, DISCUSSION AND ANALYSIS

A. CONDUCT OF JUDGES, OTHER BENCH OFFICERS, AND COURT EMPLOYEES

1. JUDICIAL CONDUCT

FINDINGS

In determining whether incidents of gender bias occur in the courtrooms of California, the inquiry must begin with an examination of judicial conduct. Margaret Morrow, then president of the Los Angeles County Bar Association, explained why studies of gender bias in the courts have focused primarily on the judiciary: "It is they who set the tone. It is they who control the participants. It is they who define the boundaries of appropriate and inappropriate conduct, and they, who in many cases, make the ultimate decision as to the rights and responsibilities of the litigants."²

Judges' control of the courtroom requires that their behavior be beyond reproach. Unfortunately, the committee received a number of reports of biased conduct, summarized below. Yet, despite the description of judicial conduct that follows, the consensus of those who participated in the committee's inquiry appears to be that attorney conduct is worse.³ This report focuses on judicial conduct because of the greater impact it may have on the outcome of litigation and because of the unique role and duties of the judiciary.

With respect to judicial conduct, the advisory committee found:

² Los Angeles public hearing transcript, p. 34.

³ *Ibid.*, indicating that only 28.3 percent of California judges had never observed conduct of this nature by an attorney.

1. Upon occasion, conduct of judges constituting gender bias has resulted in judicial discipline by the Commission on Judicial Performance.
2. Many more examples of conduct exhibiting gender bias or the appearance of gender bias have occurred that have *not* resulted in judicial discipline. Such bias has been demonstrated through both overt and subtle forms of the following kinds of conduct:
 - (a) Occasional openly hostile behavior;
 - (b) Utterance of sexual innuendos or dirty jokes;
 - (c) Frequent and offensive use of terms of endearment to refer to women participants in the courtroom;
 - (d) Failure to extend on an equal basis common courtesies to women participants, such as a handshake or an appropriate form of address;
 - (e) Focusing on the personal appearance of women court participants;
 - (f) Reliance on stereotypes about women rather than on judgments unique to each individual;
 - (g) Adoption of a tone toward women participants that is fatherly, either courtly and patronizing or harsh and reprimanding;
 - (h) Unequal extension of professional courtesies;
 - (i) Imposition of unequal standards of advocacy;
 - (j) Hostility and impatience toward causes of action primarily involving women, such as sexual discrimination or harassment;
 - (k) Imposition of penalties, such as denial of continuances of trial or depositions, on women participants who are pregnant when similar penalties would not have been imposed for a disabling condition affecting men;
 - (l) Failure to intervene appropriately when conduct constituting gender bias is exhibited by some other court participant under the judge's control, such as opposing counsel, a bailiff, or a court clerk.
3. Conduct of judges and other bench officers constituting gender bias, even when the conduct is relatively minor in its immediate manifestation, undermines the credibility of the female participant and generally impugns the integrity of both the judiciary and the entire judicial system. This result is exacerbated when court employees who work under the direct supervision of the judge exhibit similar behavior.
4. An appropriate remedy for this behavior is a specific section of the Code of Judicial Conduct, similar to that contained in the American Bar Association (ABA) Draft Model Code of Judicial Conduct, that requires a judge to perform all judicial duties without bias or prejudice, to refrain from

manifesting bias or prejudice by words or conduct, and to ensure that all staff and counsel conform to the same standard of behavior.

5. Incidents of conduct evidencing gender bias by other judicial officers have occurred. These officers should be required to refrain from exhibiting and to prevent gender bias in the proceedings they adjudicate. In addition, the availability of mechanisms to enforce these officers' ethical duties should be clarified.
6. A manual on courtroom fairness will assist judges in ensuring that the courtroom environment is free from gender bias and will provide training for court employees under judges' direct supervision and control.
7. Informal local mechanisms for resolving the more subtle and less serious complaints of gender bias are urgently needed.
8. Judicial membership in clubs that practice invidious discrimination creates an appearance of impropriety and undermines the efforts of courts to achieve equal justice.

RECOMMENDATION 1

Request the Judicial Council to transmit and urge consideration by the California Judges Association of the advisory committee's recommendation that the association adopt canons 3B(5) and (6) of the Model Code of Judicial Conduct of the ABA. These canons impose the obligation on judges to perform all judicial duties without bias or prejudice, to refrain from manifesting bias or prejudice by word or conduct, to prohibit staff and others under the judges' control from engaging in similar conduct, and to require lawyers to refrain from similar conduct.

DISCUSSION AND ANALYSIS

- **Conduct Resulting in Judicial Discipline**

Retired Los Angeles Superior Court Judge Billy G. Mills has been an expert in judicial education on fairness in the courts for many years. Long before gender bias in the courts became a nationally recognized problem, Judge Mills taught in his courses that personal bias, including gender bias, constitutes judicial misconduct. As Judge Mills explained:

Allowing personal bias to influence judicial behavior is a form of judicial misconduct. This type of conduct, more prevalent than most judges would like to admit, often goes unchecked. On the one hand, judges are human, and like everyone else, their perceptions are formed by personal experiences. Thus, the potential for bias, stereotyping and prejudice exists in every judge. Further, judges may have sublimated their personal biases, and would take offense at the suggestion that they allow their personal feelings to interfere with judicial conduct. On the other hand, by definition, a judge must be impartial and objective. In recognition of these conflicts, judges are not expected to be without personal biases. They are, however, expected to keep their biases from manifesting themselves in their conduct. If a bias, stereotype or prejudice manifests itself, the judicial system will be viewed as unfair by the participants. In the words of former Chief Justice Warren Burger, "To perform its high function in the best way, justice must satisfy the appearance of justice." (*Aetna Life Inc. Co. v. Lavoie* (1958) 106 S.Ct. 1580, 1587.) *As such, a judge cannot successfully perform judicial duties unless he or she creates the perception of fairness.*⁴ (Emphasis added.)

Although gender bias can be a form of judicial misconduct, such bias is underreported. Justice Arleigh Woods, presiding justice of the Court of Appeal, Second District, Division Four, was the chair of the Commission on Judicial Performance at the time of the Los Angeles public hearings. In her testimony, she informed the advisory committee that the commission received a relatively small number of complaints against judges involving allegations of gender bias. She also stated: "We are aware that many incidents go unreported, either because the victim does not feel that the transgression is of sufficient magnitude to warrant commission attention, or fails to report out of embarrassment or fear of future repercussions. This is particularly true when the potential complainant is an attorney or court personnel."⁵ Justice Woods lamented the failure of presiding judges and judicial colleagues to report incidents of gender bias to the commission.

As a result of this perceived underreporting, for educational purposes, the commission devoted a section of its 1987 annual report to citing examples of biased conduct that led to discipline in California and other states.⁶ Caselaw describing conduct that has warranted discipline in California is also illuminating. The cases are described here in some instances in unexpurgated language from the commission's findings. The purpose of this verbatim account is not to offend but rather to demonstrate the nature of

⁴ Mills and Sato, *The Effect of Judicial Misconduct and Personal Bias on Courtroom Fairness* (May 27, 1988) Supp. to the Metropolitan News Enterprise, p. 7.

⁵ Los Angeles public hearing transcript, p. 54.

⁶ See Commission on Judicial Performance Annual Report (1987).

the conduct without the protective veil polite language affords. The language appears in the official reports.

The first reported case in California that included identified incidents of gender bias and resulted in a judge's removal was *Geiler v. Commission on Judicial Qualifications* (1973) 10 Cal.3d 270. In *Geiler*, the Supreme Court affirmed the commission's findings that:

1. "In the summer of 1969, at a time when five to six men were in Judge Geiler's chambers, Mrs. P., his court clerk, entered the judge's chambers at his request. Shortly thereafter she left. As she was leaving, Judge Geiler stated, 'How would you like to eat that?' His question referred to Mrs. P. This comment was a crude effort at humor and part of an established course of conduct."⁷
2. "In the early part of 1970, Judge Geiler occasionally asked Mrs. P., 'Did you get any last night?' This comment was a crude effort at humor and part of an established course of conduct."⁸
3. Judge Geiler was "found to have invited two female attorneys into his chambers wherein he discoursed on the salacious nature of the evidence adduced in criminal cases concerning homosexual acts and rape, punctuating his commentary with profane terms for bodily functions."⁹

In *In re Robert S. Stevens* (1981) 28 Cal.3d 873, a judge was censured for persistent telephone calls to a former secretary in which he exhibited vulgar and offensive language of an explicitly sexual nature.

Behavior of a different sort resulted in a judge's censure in *Roberts v. Commission on Judicial Performance* (1983) 33 Cal.3d 739, 744–45. In *Roberts*, the judge in a dependency proceeding refused to hear legitimate objections from a woman attorney, commented on the lack of credibility of the dependent child's mother and refused to let her continue her testimony, and demonstrated similar behavior toward a second female witness. In another matter, the judge called a female defense attorney into his chambers, accused her of being incompetent to represent the defendant, and questioned her about the extent of her legal experience.

⁷ *Geiler v. Commission on Judicial Qualifications* (1973) 10 Cal.3d 270, 279, fn. 6.

⁸ *Ibid.*

⁹ *Id.*, p. 277.

In *Ryan v. Commission on Judicial Performance* (1988) 45 Cal.3d 518, 544, a judge was removed in part for telling offensive jokes to women attorneys. The Supreme Court summarized the evidence as follows:

The judge admits telling the following joke while two female attorneys, among others, were present in his chambers:

"It's during the period of creation and God has just gone ahead and has made—he's made the earth and the stars and the wind and some of the animals. He's still creating things. Adam and Eve have been created. They discover each other and they discover the physical portions of each other and they lay down and they make love. When they finish, Eve leaves for a little while and then returns. When she returns, . . . Adam says, 'where have you been?' She says, 'I went to the stream to wash off.' And Adam says, 'gee, I wonder if that's going to give a scent to the fish?'"

. . . In another court, . . . Judge Ryan asked . . . two female attorneys if they knew the difference between a Caesar salad and a blow job. When the attorneys responded that they did not know the difference, the judge said, "Great, let's have lunch."¹⁰

Kloepfer v. Commission on Judicial Performance (1989) 49 Cal.3d 826 involved allegations that a judge had questioned the competence of two women attorneys in a rude and humiliating manner. In recommending the judge's removal, the commission relied in part on an incident in which the judge told a deputy district attorney in open court that he was appalled that the interests of the State of California rested in her hands. In a separate incident, the judge publicly demeaned a female attorney in front of her client and in open court. The judge "opined that she was afraid to go to trial, remarked that she was psychologically not capable of putting on a trial, and questioned her in a rude and derogatory manner about when and where she had done jury trials in the past."¹¹ The Supreme Court adopted the commission's findings of fact and conclusions of law, and Judge Kloepfer was removed from office.¹²

Finally, in an inquiry concerning Judge David Kennick, the commission found that the judge had repeatedly referred to female attorneys, defendants, and court personnel in open court and elsewhere using terms of endearment such as "sweetie, sweetheart, honey, dear, and baby" in an "unprofessional, demeaning, and sexist manner."¹³ The judge also called a woman deputy district attorney into chambers and, without any apparent cause, accused her of creating a security hazard in the courtroom. The judge yelled at the

¹⁰ *Ryan v. Commission on Judicial Performance* (1988) 45 Cal.3d 518, 544.

¹¹ Inquiry Concerning a Judge No. 70, filed March 4, 1988, p. 3, on file at the AOC.

¹² See *Kloepfer v. Commission on Judicial Performance* (1989) 49 Cal.3d 826.

¹³ Inquiry Concerning a Judge No. 72, filed Jan. 8, 1988, pp. 5–6, on file at the AOC. The commission's recommendation was followed by the Supreme Court in *Kennick v. Commission on Judicial Performance* (1990) 50 Cal.3d 297.

district attorney, paced the room, and pointed his finger at her. She emerged from the courtroom in tears. Judge Kennick was later heard remarking about how funny it was that he had upset this attorney and made her run out of the courtroom. For this and other conduct, the commission recommended and the Supreme Court ordered that Judge Kennick be removed from office.¹⁴

These cases document only the most egregious incidents of gender-biased conduct. In fact, very few discipline cases have involved such conduct; and each case that does involve bias involves other acts warranting discipline as well. If, as the former chair of the Commission on Judicial Performance testified and as other witnesses corroborated, similar incidents are simply not reported to the commission, then remedies in addition to discipline must be considered.¹⁵

Complaints of gender-biased conduct may be increasing as these issues receive more and more public attention. A number of completed reports from committees conducting similar studies in other states are now available.¹⁶ These studies have all highlighted judicial conduct. Issues of gender bias relating to judicial conduct have received attention from judicial agencies throughout the country as well.¹⁷ Judicial gender bias has also been the subject of national inquiries, such as the hearings before the American Bar Association Commission on Women in the Profession at the midyear meeting of the association in Philadelphia in February 1988. Finally, the subject has been discussed in the national legal press.¹⁸ It is reasonable to assume, then, that complaints may increase as awareness and education bring these issues to the public's attention, and that preventive measures in addition to the remedies of judicial discipline are necessary.

¹⁴ Other acts of misconduct involving gender bias by judges have been occasionally reported in the newspaper, but they have not come to the attention of the advisory committee in any other manner. Because these newspaper accounts may relate to pending commission proceedings that are confidential, no mention of these accounts is made here.

¹⁵ Since this report was issued, at least one additional significant discipline case relating to gender fairness was decided by the Supreme Court. In *Fitch v. Commission on Judicial Performance* (1995) 9 Cal.4th 552, as modified at 9 Cal.4th 8236, a trial court judge was publicly censured for (1) inappropriate and offensive comments concerning the physical attributes and clothing of female members of the court staff; (2) inappropriate and offensive remarks concerning the intimate relations of court attachés or attorneys with their spouses; and (3) other inappropriate and offensive remarks in the presence of court staff. In addition, the commission found that (4) petitioner singled out women working under his supervision for inappropriate and nonconsensual touching, or attempted touching, although such conduct was "unusual and episodic," occurred over a lengthy period, was relatively infrequent, and did not constitute a pattern of misconduct.

¹⁶ The states that had completed reports as of 1989 were Maryland, Massachusetts, Michigan, Minnesota, New Hampshire, New Jersey, New York, Rhode Island, and Washington.

¹⁷ See, e.g., *Discipline Caselaw Reflects Gender Bias in the Justice System* (1985) 7 Judicial Conduct Reporter 1.

¹⁸ See, e.g., Kushner and Lezin, *Bias in the Courtroom* (1987) 14 Barrister Magazine 9-11, 38, 46; Blodgett, *I Don't Think That Ladies Should Be Lawyers* (1986) 72B ABA Journal 48-53.

- **Other Conduct**

Judges who responded to the Judges' Survey were asked: "In the last three years, have you observed remarks or jokes in the courtroom, in chambers, or in informal professional gatherings, which you considered demeaning to women?" Based on the survey responses, we can generalize that approximately 11 percent of California judges observed such conduct either frequently or on occasion. An additional 35.5 percent said they observed such conduct rarely, but had observed at least one incident. Thus, 46.5 percent of all California judges said they had observed "remarks or jokes . . . demeaning to women" at least once during the three-year period covered by the survey, and 53.5 percent said they had never observed an incident of this nature during the same period.¹⁹ Incidents reported to the committee are summarized below.

Conduct that is openly offensive, hostile, or involves sexual innuendo. Like the examples in the discipline cases, this extreme category of judicial behavior may, in fact, rarely occur. This extreme conduct, described behind closed doors and submitted anonymously in writing, does, however, provide some corroboration for the view that incidents are underreported to the Commission on Judicial Performance. Incidents of judicial conduct reported to the advisory committee included referring to counsel as a "high-strung girl" who must be handled; making derogatory remarks about women lawyers in general, engaging in unwanted flirting or sexual advances, ogling and leering at female witnesses or court employees, pinups in chambers, sexist jokes, reading sexually explicit magazines on the bench, and indecorous touching.

In one county, a female family lawyer became embroiled in a rather vicious dispute with a male opposing counsel in chambers. The judge was present. When the female attorney accused her male opposing counsel of lying, he called her a "fucking cunt." When the female lawyer became enraged, the judge told her to calm down, stating "it's advocacy." The judge then asked her whether she knew "the difference between a cunt and a pussy."²⁰

In another county, during a settlement conference in chambers, a judge became angry that the parties had not reached an agreement and pointed at every person in the room in turn saying, "I will not do your dirty laundry." When the judge came to the female attorney who was co-counsel for the plaintiff, he smirked and said, "Except for you, I will do your dirty laundry." The judge then singled out the female attorney to type the order, saying, "Come on sweetheart, I know you can type and if you want to do your client a favor, you will type it."²¹

¹⁹ Judges' Survey, question 9a.

²⁰ Orange County regional meeting summary, p. 11.

²¹ Written comment, in Summary of Written Materials Received, p. 20; written comments received as of Apr. 15, 1988, were summarized and are on file at the AOC.

Letters were forwarded to the advisory committee complaining of the conduct of a judge about to retire who delivered a talk on "judicial temperament" to a professional association. Observers reported that the judge made numerous derogatory remarks about women judges and lawyers, referring to women lawyers as "menopausal" dabblers who entered law school only after they completed their maternal duties. He stated that women judges could not meet his "rigorous standards" and that he knew of only one competent female jurist.²²

Terms of endearment, refusal to extend common courtesies, inappropriate forms of address, personal appearance. The committee received a number of complaints about this category of conduct. Witnesses too numerous to mention cited instances of being called "honey" or some other familiar term usually reserved for members of one's family, of being excluded when the handshakes were passed out, of being called by a first name when opposing counsel was not, of being singled out and complimented, sometimes in a risqué fashion, for appealing elements of personal appearance. At the Sacramento public hearing, the then president of California Women Lawyers, Janice Kaminer-Reznik, told the advisory committee about the many letters and complaints that her organization and its affiliates receive citing examples of this kind of conduct.²³ Most witnesses and those who submitted written comments appeared almost apologetic about bringing up these subjects. They acknowledged that the perpetrators were often well-meaning or at least oblivious, but that the attorney's pain, discomfiture, and annoyance, and the resulting effect on the client might be greater than the incident would indicate. An example occurred in Los Angeles: "I've had a judge remark in a court proceeding, when I appeared on an *unopposed motion*, that the reason he was granting my motion, and this is a quote, was because I was so attractive and brightened up his courtroom that morning."²⁴ (Emphasis added.)

Stereotypes. Stereotypes about women, as about men, are legion. They can influence unfairly the treatment of all the female participants in the courtroom, from the woman attorney to the female expert witness to the female litigant. Women attorneys face stereotypes that place them in a classic double-bind situation. In an article on gender bias in the courts, a woman judge observed: "The female attorney is in a constant dilemma. If she appears too feminine, displays compassion, and is soft-spoken, she is considered too weak to be effective. If she asserts herself and is aggressive, she is condemned for being too pushy and abrasive. Either way she stands to lose."²⁵

²² Written comments dated Feb. 16, 1989, and March 1, 1989, on file at the AOC.

²³ Sacramento public hearing transcript, pp. 15–17.

²⁴ Los Angeles regional meeting summary, p. 8.

²⁵ Caputo, *A Review of Gender Bias in the Courts* (1985) 22 Court Review 16.

The stereotypes that witnesses cited to the advisory committee include:

- Belief that women are too emotional or anger too easily;
- Opinion that female aggressiveness is unattractive and inappropriate;
- Distaste for dissension between two women ("the cat-fight factor");
- Belief that women should be taking care of children and should not be in the workplace;
- Belief that women are tricky or manipulative;
- Belief that men should be in a paternal role toward women either to protect and flatter them or to reprimand them when they go astray.

Examples of these stereotypes in operation are common throughout the transcripts of the regional meetings and are also present in the written comments received by the committee. A few examples follow.

Some judges, a Los Angeles woman attorney wrote, fail to object to the behavior of a rude or overbearing male attorney but do not accept the same behavior from a female, especially if she is young. The attorney believes that judges' attitudes may be based on the mistaken belief that male aggressiveness is natural, whereas female aggressiveness is rude.²⁶

Women lawyers in one county reported that, on three separate occasions, a judge brought a woman attorney into chambers before the beginning of the trial and told her in front of the opposing male attorney, "Do not try any of your feminine tricks in my courtroom. I will not put up with it. I don't want any of your emotionalism. I don't want any of the feminine tricks and don't forget."²⁷

This behavior is also exhibited toward women when they appear as parties. A woman attorney reported that a judge stated: "By the way, I notice that your client is a woman. I just want to make sure we're not going to get all emotional and histrionic out there."²⁸

On more than one occasion, with an apparent distaste for women who are in contention, judges likened vigorous legal argument between two women attorneys to a "cat fight." One attorney stated: "And my opposing counsel and I went into chambers and we were arguing our points, and in the middle of our argument the judge said, 'Now ladies, if you can't behave properly, you should not be in this courtroom. You're acting like cats. And you can go outside and discuss whatever you want, but in here you have to

²⁶ Written comment, in Summary of Written Comments Received, p. 19.

²⁷ Orange County regional meeting summary, pp. 11–12.

²⁸ *Id.*, p. 13.

act like ladies."²⁹ This likening of women opposing counsel to cats occurred in Fresno as well. An attorney reported: "I was in court, and . . . we went in and said, 'We feel that we may have had this—we may have settled this, but we have one thing that we aren't sure about. We're going to check that out, and we'd like to have a continuance to see if we can settle this.' He kind of laughed and said, 'What'd you gals do, go out in the hallway and have a cat fight?'"³⁰

Judges were also reported to be excessively reprimanding, overly protective, or interfering toward women attorneys. For example, in San Diego, an attorney said:

. . .[T]wo women . . . were arguing a motion, and after each one finished speaking, the judge would address both counsel, and explain to the other one what that woman had just said. He said, "Now I guess what you really mean to say is this," and then the other one would give her argument, and then he would turn around and say, "Now, what you really mean to say is this." And it was a very patronizing attitude.³¹

Unequal extension of professional courtesies and the application of a double standard to female advocates. Women lawyers at every regional meeting reported that judges often failed to extend professional courtesies to them and seemed to judge their advocacy according to a higher standard. The effect of this behavior was to make these women feel that they were not members of the exclusive club known as the bar.

Frequently, judges can forgive the inadvertent errors of counsel because they understand the realities of practicing law. In both rural areas and large metropolitan regions, attorneys may travel long distances to attend court appearances. A judge can make things easier by perhaps calling an attorney in another county to find out the attorney's arrival time, or by forgiving tardiness. Requirements such as stating objections for the record or timely service of documents are sometimes relaxed. Continuances can be granted, despite this era of delay reduction, for illness or calendar conflicts. It is often in these daily, discretionary decisions that judges' biases can emerge. The lawyer whom the judge knows or whose work appears reliable is usually forgiven, is not sanctioned, and is extended every courtesy. Women attorneys reported their belief that more often than not the lawyer to whom the judge extends these courtesies is male. In contrast, women professionals must work twice as hard and adhere strictly to every protocol because they are not as well known or trusted by the judge. Indeed, 62 percent of those who responded to a survey of women lawyers conducted by the State Bar believed that

²⁹ Los Angeles regional meeting summary, p. 9.

³⁰ Fresno regional meeting summary, p. 13.

³¹ San Diego public hearing transcript, p. 41.

they are not accepted as lawyers by men in the legal profession, and 38 percent believed that they will never achieve equal status to male lawyers.³²

The committee received significant testimony of unequal treatment. For example, one attorney told the following anecdote:

She was over here on a multi-jillion dollar case of some sort at a settlement conference, and they were hammering it out, and multiple co-counsels from all over the place, and since they were from out of town and so on and settlement was at hand, they worked late into the night and the court reporters were gone and they finally reached a settlement, and they were going to go into the courtroom and put it on the record, even though there was no court reporter, and there were six or eight lawyers lined up, and the judge looked at her, the only woman, and asked her to take down the settlement. He didn't ask her if she could type, but it was close.³³

A woman litigator whose 15-year practice involved costly, complex litigation related an anecdote in which she was not permitted to oversee distribution of a major settlement—despite the fact that she knew more about the litigation than any of the other attorneys.³⁴ She then related the following:

I was to be second chair at that trial, but I was the person who had worked the case up for trial, and I was prepared to argue all of the *in limine* motions, and they were substantial. When we got to court, the first thing I noticed is that *I was invisible*. The judge just simply did not recognize that I was there.

I was the only woman on the team, and there were six lawyers in chambers, and every comment, whether social or dealing with the merits of the case, every comment, every question, was addressed to my colleagues.³⁵ (Emphasis added.)

Another attorney who is female and Southeast Asian related the following:

A few weeks ago, I had to try a case in front of one of our judges. The judge asked that counselors state our name for the record. My opponent stated his name, and then I stated mine. The judge looked down at me from the bench, and in open court, and asked me, "Are you an attorney?" I said, "Yes, sir" He then asked, "Are you licensed to practice here?" I

³² Women Lawyers and the Practice of Law in California, a survey conducted by the Committee on Women in the Law, State Bar of California, in cooperation with the Employment Law Center/Legal Aid Society of San Francisco, Laidlaw and Kipnis, Associates, Summary of Findings, Conclusions and Recommendations (1989), p. 3.

³³ Fresno regional meeting summary, p. 7.

³⁴ San Francisco regional meeting summary, p. 3.

³⁵ *Ibid.*

said, "Yes, sir." He continued to ask, "Will you provide me with your bar number after the trial?" I said, "Certainly sir."

All of this questioning of my credentials was done in open court in front of my client and my opponent, when it should have been done in a more discreet manner out of the hearing of my client and my opponent.

Since the judge did not know me, it was reasonable for him to ascertain my authority. However, questioning my credentials in open court in front of my client and opponent could well undermine my credibility and thus damage my client's interest.³⁶

Hostility toward certain causes of action usually involving women. Some attorneys reported that judges appeared hostile to certain causes of action usually involving women, such as sex discrimination and sexual harassment cases. One woman reported that a judge, when told in chambers that a case involved sex discrimination, visibly grabbed his crotch for more than a minute, rocked back in his chair, smiled and said, "I've been waiting to get one of these."³⁷ Another woman said that a judge likened her female client's wrongful termination suit to "a \$4 an hour clerk . . . getting in a huff over nothing and suing about it."³⁸ A third attorney reported that at a public forum for judicial candidates sponsored by a local women's bar, a local judge running for reelection stated that he believed sex discrimination is permissible because it is not specifically prohibited by the Constitution.³⁹

Attorneys who practice in this area and who participated in the regional meetings generally believed that the hostility toward these causes of action influenced judicial rulings in the areas where judges exercise discretion.⁴⁰ One example was reported by a San Francisco attorney about a state court case litigated in another county. The attorney said:

Voir dire proceeded in slightly better fashion, except that the judge refused to excuse a potential juror for cause when that juror stated that under no circumstances would he allow his wife to work outside the home. My case was a wage and sex discrimination case in employment.

. . . During my cross-examination of a corporate financial officer to whom the judge seemed particularly favorably disposed, at a point where the

³⁶ Fresno public hearing transcript, p. 47.

³⁷ Written comment, in Summary of Written Comments Received, p. 14.

³⁸ *Id.*, p. 16.

³⁹ *Id.*, p. 19.

⁴⁰ Since the initial draft report was issued, a Court of Appeal reversed a trial court judgment in a sexual harassment suit based on the gender bias of the trial judge and included the express finding that the trial judge conveyed the sense that he considered sexual harassment cases a misuse of the judicial system. See *Catchpole v. Brannon* (1995) 36 Cal.App. 4th 237.

officer was just about to be impeached by a showing that he knew that other managers at plaintiff's level made more money than she, the court stopped my examination, took counsel into chambers and began insisting that while he considered himself a strong supporter of women's rights and he believed in full equality of pay for women, he believed that this case involved too much detail. He would not allow further questioning along the same lines—that is, what she made and what the other managers made—and said the only thing he would allow is "in what conversations or what ways did they in any way discriminate against her, and the rest of this is hogwash." Of course, such testimony regarding wages of various managers would be highly relevant in this kind of case.

The case was painful. It was terrible. It was very upsetting, and it was reversed on appeal.⁴¹

Response to pregnant women. Attorneys also reported that, in some instances, judges were not comfortable with the ways in which the pregnancy of a woman attorney or other participant might affect the proceedings. Janice Kaminer-Reznik testified at the Sacramento public hearing that some courts are refusing to grant continuances of trial when an attorney is pregnant and about to deliver. She suggested that a policy was needed regarding continuances of court proceedings for pregnancy and childbirth leaves. She pointed out that if a lead attorney in a complex case is unable to obtain even a brief continuance for childbirth, then firms may be less willing to assign the most important and complex cases to women of child-bearing years.⁴²

Judicial intervention. Many of the lawyers who attended the regional meetings agreed that judicial intervention was essential to correct gender-biased conduct by opposing counsel or court personnel. These witnesses considered the failure to intervene, the failure to take bias seriously, and even the encouragement of such conduct, to constitute gender bias itself. A judge's tacit or explicit approval cloaks the offending conduct with a mantle of legitimacy not present if the conduct is identified and disapproved of in some manner. Commentators agreed, however, that the manner of proceeding is a delicate issue. Most preferred a sidebar or chambers conversation with counsel or a discussion after hours with court personnel. Sensitive to the need to avoid unduly influencing the jury, most attorneys did not favor a comment from the judge in open court. Although attorneys generally suggested that the judge initiate corrective measures, one attorney cautioned:

But it's a very difficult situation because you don't want to be perceived as unable to take care of yourself and in need of a knight in shining armor.

⁴¹ San Francisco regional meeting summary, p. 16.

⁴² Sacramento public hearing transcript, pp. 17–18.

And so I'm very reluctant to do that too often if I don't see that a judge is willing to, at some point, take control of his or her own courtroom and . . . make some decisions about how the case will be conducted.

Because whether I get a strategic advantage from it or not, it's the judge's decision as to what conduct will be tolerated in the courtroom. And if it is not germane to the issues of the case I don't think it ought to be tolerated on either side.⁴³

Based on the results of the Judges' Survey, it appears that judges favor intervention when offending conduct occurs. Judges were asked: "In what situations in the courtroom or in chambers do you think it is appropriate for a judge to intervene when the judge observes behavior exhibiting gender bias?" Judges could choose as many of the following responses as they believed applicable: (1) every time it occurs; (2) whenever requested; (3) only when the offending behavior might influence the outcome of the case; (4) whenever intervention does not unduly interrupt the proceedings or become counter-productive; (5) never; and (6) other. Only one judge selected the choice "never." Of the judges who responded to the question, 48.6 percent selected "every time it occurs."⁴⁴ The narrative responses provided when judges were asked about their chosen methods of intervention reveal that judges are also sensitive to the effect a possible reprimand would have on the jury, but that judges appear willing to correct improper forms of address, terms of endearment, sarcastic references, and demeaning comments. Judges seemed to recognize that these comments can occur in a wide variety of circumstances, that intervention is necessary, and that the method of intervention must be cautious, suited to the circumstances, and creative.⁴⁵

Judges' apparent willingness to intervene must be qualified by one caveat. To intervene effectively, a judge must first recognize expressions of bias when they occur. Many judges do not. Their lack of understanding undermines their ability to ensure fairness in the courtroom. That is one of the reasons judicial education is crucial.

- **Consequences of Judicial Conduct Exhibiting Gender Bias**

The most severe form of gender-biased conduct, such as overtly hostile or sexually offensive behavior, undermines the administration of justice and tarnishes the court's reputation for fairness in the legal community and the community at large. As the ABA Model Code of Judicial Conduct provides in its Commentary, "[a] judge who manifests bias . . . in a proceeding impairs the fairness of the proceeding and brings the judiciary into disrepute."⁴⁶ Biased conduct cannot be tolerated and, indeed, when it is reported to

⁴³ Los Angeles regional meeting summary, p. 24.

⁴⁴ Judges' Survey, question 10.

⁴⁵ Judges' Survey, question 11.

⁴⁶ See ABA Model Code of Judicial Conduct, canon 3B(5), Commentary.

the Commission on Judicial Performance, it results in disciplinary proceedings. But what are the consequences resulting from the scores of less serious incidents committed by judges who act perhaps unknowingly and whose effect, if taken on an individual basis, is minimal?

Attorneys and judges at the focus groups conducted at the State Bar Annual Meeting in September 1988 described these incidents as something to be lived with, part of the rough and tumble of courtroom life. The cumulative and long-term effect of this behavior, however, on a woman lawyer, litigant, or court employee can be more significant.

Attorneys were asked at the regional meetings to discuss the consequences of biased judicial conduct. Many spoke of a feeling of hopelessness about ways to curtail it. Others referred to the deleterious effect that witnessing the behavior had on their relationships with clients. In some cases, attorneys firmly believed that the conduct influenced case outcomes. Some women said they decided to leave litigation as a result of the uncivil conduct, including conduct exhibiting gender bias, that occurs. Others who had once practiced in fields traditionally dominated by men, such as antitrust, said they chose to find another area of practice more hospitable to women. One woman described her experiences as an antitrust attorney in federal court:

One of the reasons I left the antitrust division of the United States Justice Department was the constant hurdles I faced being an antitrust lawyer. I majored in economics as an undergraduate. I have a real fondness for economics, and it just boggled both the judges', unfortunately, and my opposing counsels' minds that I could be an antitrust lawyer.

I guess small black women can maybe comfortably go into family law, even more successfully, into civil rights law; but economic analysis and antitrust were something that they felt was really left for the big boys, and really too technical for someone like me to comprehend.

The first time I flew down to Los Angeles to try to stop a merger, I was asked by the judge, "Do you really understand all the economics involved in this case?" I wasn't sure the judge really understood all the economics involved in the case, but I really thought I had a grasp on it.

Unfortunately, what I noticed in the antitrust division, I was the only minority attorney there during my five years. There were other women, and none of the women was ever put into the role of lead counsel, which means they would lead the team of attorneys. You know antitrust work, you can't do it by yourself.

And as I got to be there about four or five years, I realized, you know, I'm really ready to lead a team here, and I'm never going to get to do that. And one of the things that the people who I've worked with used to

reinforce the fact that the women in the antitrust division were not being elevated where they should was, you know, "Even the judges don't think you guys really understand this."

So you had the perceptions of your judges affecting your ability to move up in that employment setting that you had chosen.⁴⁷

One of the most profound effects of gender-biased judicial conduct is how it undermines the credibility of women. Judicial conduct that is biased reinforces the public's own biases and stereotypes. The following anecdote, told by a highly qualified litigator, illustrates this point:

I was representing a client who really had chosen another attorney, who was unavailable in trial, and so I was second chair, but was the person who would do it. And seeing the reception and the hostility that I was receiving from the court—or the lack of credence, is a better word, just lack of credibility, made the client have significant doubt, and that if there had been a way to get that male attorney in, he would not have continued to have me represent him. It turned out there was no choice.

But it's a major problem for a client who goes into court with you to see that their advocate does not have respect or credibility or is not listened to commensurate with their experience.⁴⁸

Lynn Schafran, an attorney who heads the National Judicial Education Program to Promote Equality for Women and Men in the Courts, has written on the devastating impact of gender-biased judicial conduct on women's credibility. Schafran has pointed out the overwhelming importance of credibility to the advocate: "'Credible' is the crucial attribute for a lawyer."⁴⁹ Yet, historically, women have been considered the less credible sex, unfit for ownership of property, the exercise of the franchise, and the practice of law. Despite the changes that have occurred in recent years, notions of women as less credible persist, according to several studies cited by Schafran. One study showed that students gave more weight to the views of male professors, finding them more authoritative, more credible, and more believable than their female professors. Male students favored male professors even more dramatically than did female students.⁵⁰ Schafran further noted:

What must be understood about these incidents is that they result in more than personal embarrassment, humiliation, and anger for the women involved, and that whether the offending remarks are unintentionally sexist

⁴⁷ San Francisco regional meeting summary, pp. 10–11.

⁴⁸ San Francisco regional meeting summary, p. 23.

⁴⁹ Schafran, *Eve, Mary, Superwoman: How Stereotypes about Women Influence Judges* (1985) 24 *Judges' Journal* 12, 16; See also Schafran, *Credibility in the Courts: Why is there a Gender Gap?* (1995) 34 *Judges' Journal* 5.

⁵⁰ Wikler, *On the Judicial Agenda for the 80's: Equal Treatment for Men and Women in the Courts* (1980) 64 *Judicature* 202.

or deliberately made, their consequences are the same. In the courtroom, in chambers, and in other professional settings, terms of endearment, comments on looks and clothing, and remarks that otherwise call attention to the individual as a woman rather than as a lawyer undercut her credibility and her professionalism.⁵¹

- **Need for a New Section in the Code of Judicial Conduct**

Commentators urged that the Code of Judicial Conduct be amended to impose on judges a specific ethical duty to refrain from engaging in gender-biased conduct and to prevent others from engaging in such conduct in the courtroom. Such an amendment has been discussed since 1986 when the State Bar Committee on Women in the Law circulated a proposal urging the California Judges Association to adopt a new code section.⁵² Adoption of a code section was also specifically recommended by Queen's Bench, a San Francisco women lawyers' organization, at the San Francisco public hearing.⁵³ Similarly, the ABA has debated this issue and has proposed a draft provision regarding bias to be added to the ABA's Model Code of Judicial Conduct.⁵⁴

The advisory committee recognized that neither the committee nor the Judicial Council has authority to require additions to the Code of Judicial Conduct, which was promulgated by the California Judges Association at the time this report was originally submitted.⁵⁵ The committee nevertheless was strongly persuaded by the extensive information provided on judicial conduct in the courtroom that a code provision would be a vital tool for curbing incidents of gender bias. At their worst, these incidents impugn the integrity of the judicial process. Even trivial incidents unfairly reduce the credibility of women participants in court procedures.

In considering adoption of a code section on gender bias, the California Judges Association should carefully consider using the language of the proposed ABA Model Code section.⁵⁶ That section has had the benefit of national debate and comment and has

⁵¹ Schafran, *Abilities vs. Assumptions: Women as Litigators* (August 1983) Trial 38. See also National Conference of State Trial Judges, *Avoiding Race and Gender Bias in the Courtroom* (1989) Judges' Book 57–79.

⁵² Letter and materials submitted by Christine Curtis, then chair of the State Bar Committee on Women in the Law, dated Sept. 11, 1986.

⁵³ See testimony of Jill Schlichtman, San Francisco public hearing transcript, p. 37.

⁵⁴ See canons 3B(5) and (6), [Proposed] Model Code of Judicial Conduct (1990).

⁵⁵ A Constitutional amendment passed by the voters in November 1994, required the Supreme Court to promulgate a Code of Judicial Ethics. (Assem. Const. Amend. No. 46, res. ch. 111, adding art. VI, § 18(m). The present code was adopted by the court on April 12, 1996, and is now known as the California Code of Judicial Ethics.

⁵⁶ The proposed model section states: "A JUDGE SHALL PERFORM THE DUTIES OF JUDICIAL OFFICE IMPARTIALLY AND DILIGENTLY." Under the heading Adjudicative Responsibilities, canon 3B(5) states:

"A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, and shall not permit staff, court officials and others subject to the judge's direction and control to do so."

drawn together the best thinking on the issue. Moreover, the original California Code of Judicial Conduct was modeled after the 1972 ABA Model Code.

Adoption of the model provision would accomplish three important goals. First, it would elevate the elimination of gender bias and other biases in the courtroom to an ethical duty for all judges. Creation of such a duty may help prevent serious incidents of bias and may increase reporting to the Commission on Judicial Performance, where appropriate. Second, it would create a judicial duty to intervene, which is crucial to protecting the public from biased behavior. Such a duty to intervene would also alleviate the awkwardness faced by many women attorneys who experience incidents of gender bias in court. Finally, the provision would foster these results while specifically protecting "legitimate advocacy when race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, or other similar factors, are issues in the proceeding."⁵⁷

2. CONDUCT OF OTHER BENCH OFFICERS

RECOMMENDATION 2

(a) Request the Judicial Council to instruct the Advisory Committee on Private Judges, or any subsequent committee convened to review issues of ethics for other bench officers, to study and recommend a means of enforcing the appropriate standards of conduct for private judges relating to bias as stated in the ABA Model Code of Judicial Conduct canons 3B(5) and (6);

(b) Request the Judicial Council to transmit and urge consideration by the State Bar of the following advisory committee recommendation: The State Bar should formulate and adopt a Rule of Professional Conduct that requires lawyers serving as judicial officers to adhere to the ABA Model Code of Judicial Conduct sections 3B(5) and (6).

• Need for Clarification of Ethical Duties and Enforcing Body

The advisory committee especially appreciated the fact that the provisions of the model code refer to all forms of bias. Although the committee's charge was limited to investigating problems of gender bias, the committee targeted bias based on race and ethnicity combined with gender bias as a special focus issue. The committee determined that a code provision preventing other forms of bias was equally necessary, and there was no reason to limit the language of the code section to gender bias alone. Note that the proposed provisions of the ABA Model Code of Jud. Conduct were ultimately adopted.

⁵⁷ ABA (Proposed) Model Code, *supra*, canon 3(B)(6).

Elected and appointed judges are increasingly joined in their duties of deciding legal issues by a host of other bench officers. These include commissioners, referees, private attorneys acting as temporary judges, arbitrators, retired judges sitting on assignment, and private judges who may or may not have a specific reference from the court. The committee determined that confusion exists concerning the ethical duties of these other judicial officers and the appropriate body charged with enforcing these duties.

The Code of Judicial Conduct in effect at the time this report was first issued provided in a compliance section the following statement:

Anyone, whether or not a lawyer, who is an officer of a judicial system performing judicial functions, including an officer such as a referee in bankruptcy, special master, court commissioner, or magistrate, is a judge for the purpose of this code. All judges should comply with this code except as provided below.⁵⁸

Despite the broad mandate that "[a]ll judges should comply with this code," the compliance provision raises a number of questions in this era of increasing judicial decision making by nonjudicial officers.⁵⁹ This is especially true with respect to private judges. The increasing use of such judges, either with or without a specific reference from the court, is the subject of another advisory committee appointed by the Chief Justice. Witnesses at public hearings conducted by the Judicial Council Advisory Committee on Private Judges recognized that private judges' ethical duties and method of discipline are open questions, the resolution of which becomes even more problematic when the private judge is functioning without a specific reference from the court.⁶⁰

Others noted that private judges are sometimes used in the most complex family law matters.⁶¹ As discussed in detail elsewhere in this report, the majority of decisions in family law involve the exercise of judicial discretion and raise family emotional issues about women, children, and families. Family law is an area in which the potential for gender bias is great and thus the unregulated use of private judges could be problematic. Clarification of these judges' duties and the appropriate body to enforce them is needed.

⁵⁸ Cal. Code Jud. Conduct, Compliance with the Code Jud. Conduct. This provision specifically exempted part-time judges, retired judges, and judges pro tempore from complying with canons 5C(2), D, E, F, and G. These canons involve restrictions on business activity and investment, service as an executor or trustee, service as an arbitrator, practice of law, and appointment to a government commission.

⁵⁹ For example, the provision does not specifically refer to attorneys who serve as arbitrators in judicial arbitration proceedings. See Jud. Arbitration Act, Code Civ. Proc., §§ 1141.10 et seq.; Cal. Rules of Court, rule 1600 et seq. Presumably, an arbitrator is an officer of the judicial system performing judicial functions and covered by the code, but the clarity of the section might be enhanced if arbitrators were specifically mentioned.

⁶⁰ Los Angeles public hearing on private judges transcript, pp. 141–43.

⁶¹ Los Angeles public hearing on private judges transcript, pp. 238–49, on file at the AOC.

Another area of concern is the applicability of the Code of Judicial Conduct to commissioners. The Commission on Judicial Performance routinely receives complaints against commissioners. By rule of court, the presiding judge is charged with reviewing and redressing these complaints.⁶² Yet, the commission has noted that in some instances no appropriate mechanism at the local level exists for reviewing the complaints, and that presiding judges sometimes request assistance when complaints against commissioners are received. Consequently, the commission has considered increasing its jurisdiction, either by mandate or at the request of a presiding judge, to include review of complaints against commissioners.⁶³

- **Gender Bias Reported**

Incidents of conduct evidencing gender bias by judicial officers other than appointed or elected judges were in fact reported to the advisory committee, both at the regional meetings and the public hearings. Two examples follow.

One San Francisco woman attorney described a sex and race discrimination case that was, in her view, erroneously sent to arbitration. The arbitrator was not knowledgeable in evidentiary matters pertaining to sex and race discrimination and would not permit argument or submission of authorities on a vital evidentiary question. Although the attorney acknowledged that exclusion of the evidence after full argument would not have necessarily reflected bias, the arbitrator's denial of her opportunity to be heard appeared, in the attorney's view, to be motivated by hostility toward the cause of action and herself. Ultimately, the arbitrator was disqualified and the case was tried by a judge.⁶⁴

Another woman attorney related an anecdote in which an arbitrator gave courteous attention to the male plaintiff's attorney in a personal injury action, but when she began to present her case on behalf of the defendant public entity, the arbitrator began filing, signing letters, taking phone calls, and walking around the room in complete disregard of her presentation.⁶⁵ A third woman attorney from Orange County related an account of an arbitration in which the personal appearance of the woman plaintiff was a topic of joking and comment between the male arbitrator and the male opposing counsel.⁶⁶

⁶² Cal. Rules of Court, rules 205(16) and 532.5(a)(18).

⁶³ Letter to presiding judges from Jack E. Frankel, dated Aug. 28, 1989.

⁶⁴ San Francisco regional meeting summary, p. 18.

⁶⁵ San Francisco regional meeting transcript, p. 146.

⁶⁶ Orange County regional meeting summary, p. 15.

- **Application of the ABA Model Code of Judicial Conduct**

Based on the testimony received and the increasing use of other bench officers to resolve cases in the justice system, the advisory committee has concluded that, in promulgating the recommended ABA Model Code of Judicial Conduct sections relating to bias, the judges' association should ensure that its provisions apply to *all* bench officers. The judge's association should also clarify the ethical duties and the applicable enforcing body for all nonjudicial bench officers. This topic could also be explored by the Judicial Council Advisory Committee on Private Judges in the context of its study of private judging. Another remedy recommended by the committee was that the State Bar adopt a specific rule of professional responsibility extending the bias provisions of ABA Model Code of Judicial Conduct canons 3B(5) and (6) to lawyers acting as arbitrators or other judicial officers. Adoption of such a rule would render the State Bar's disciplinary system applicable to complaints against lawyers acting as judicial officers who exhibit gender-biased conduct.

Finally, the advisory committee was concerned not only with ensuring the adherence of all bench officers to ethical duties, but also with educating judicial officers on gender bias issues. Fairness education is especially important for lawyers who serve as temporary judges and may or may not have adequate training in the particular substantive area or in judicial demeanor.

3. A FAIRNESS MANUAL FOR JUDGES AND COURT EMPLOYEES

RECOMMENDATION 3

(a) Request the Judicial Council to instruct its staff to prepare an educational manual for judges, other judicial officers, and court personnel on fairness governing the following issues: (1) the fair treatment of and appropriate courtroom behavior toward lawyers, jurors, court staff, experts, witnesses, litigants, and others involved in the court process; (2) a suggested statement that would be optional, and that could be read or distributed in writing at the opening of trials and other appropriate proceedings expressing the court's refusal to tolerate all kinds of biases; (3) a request to the Judicial Council to amend Standard of Judicial Administration 1 to encourage judges to develop guidelines for counsel on courtesy and fairness in the courtroom.

- **Need for a Fairness Manual**

To assist both judges and court staff in ensuring a courtroom environment that is free from bias, the advisory committee recommended creation of a manual on fairness. The manual should contain guidelines on proper courtroom conduct and a general admonition that can be read to the jury at the beginning of each trial that bias has no place in the courtroom or in their deliberations. A manual would provide a valuable educational tool for employee training and could assist a new judge in developing an appropriate jury admonition.

- **Conduct of Courtroom Staff**

The behavior of his or her courtroom staff directly reflects the attitude of the judge. Attorneys, witnesses, parties, and members of the public view acts of gender bias by clerks, court reporters, and bailiffs as tacitly condoned by the judicial officer who supervises them. Thus, when a bailiff makes a sexual remark about a female defendant that is audible throughout the courtroom except to the judge who is in chambers, the judge's reputation for fairness is tarnished.

Witnesses at the regional meetings and public hearings described various incidents of biased conduct by courtroom staff. For example, one attorney requested a transcript of a colloquy with a judge she thought exhibited bias against her and met with obstructionist behavior by the court reporter.⁶⁷

Other witnesses expressed concern about the judge's clerk, who has access to the judge, ensures that papers are filed, and performs other vital clerical duties. The clerk's spirit of helpfulness can be extended unequally. Attorneys noted that some clerks respond positively to the young, dashing, and handsome cadre of male attorneys, yet become surly when the harried woman attorney toting a briefcase with a baby bottle inserted in the side pocket approaches the desk. One attorney at the San Francisco regional meeting reported being consistently ignored by a woman clerk who professed to be unable to find counsel's name among a long list of mostly male attorneys. Generally, young women attorneys spoke about the consistent need to convince court staff that they are the counsels of record. The refrain "Are you an attorney?" follows their progress through the halls of the courthouse, serving as a constant reminder that they are new arrivals in the profession. The same treatment does not appear to be directed toward young male attorneys. Attorneys also reported that courtroom staff often acquiesce in gender-biased behavior by counsel toward their female opponents in the courtroom while the judge is in chambers. Rarely do staff members report offensive incidents to the judge.⁶⁸

⁶⁷ Fresno public hearing transcript, pp. 48–49.

⁶⁸ Los Angeles regional meeting transcript, p. 105.

More frequently, court staff can themselves be victims of gender-biased behavior. In a female-dominated job category such as court clerk, sexual harassment by co-workers, judges, and attorneys can and does occur. One woman public defender noted that, historically, women clerks have been treated without a great deal of respect. It was her hope that the influx of more women attorneys who have a greater rapport with women clerks might ultimately improve their status.⁶⁹

- **Admonition to Jurors**

In the courtroom of Judge David W. Ryan of the North County Municipal Court District in San Diego, each trial begins with an affirmative statement made by the judge that "race, religion, creed, color, national origin, sex, age, handicap, and any other suspect classification that the Legislature deems appropriate have nothing to do with the case that may be at issue."⁷⁰ Judge Ryan testified that he uses this opening statement because he believes he has a duty to alert the jurors to their duty to decide the facts on the basis of the evidence—not on the basis of their personal biases or prejudices.⁷¹ Judge Ryan pointed out that bias in the courtroom simply reflects the bias in society as a whole. An admonition at the beginning of trial is a useful reminder to jurors of their duty to question and successfully combat their own biases during the course of the trial. It serves to set the tone in the courtroom for the attorneys and staff.

Judge Ryan's practice was also the subject of recommendations made to the advisory committee at the public hearings. Janice Kaminer-Reznik supported the

⁶⁹ San Francisco regional meeting transcript, p. 138.

⁷⁰ San Diego public hearing transcript, pp. 257, 260.

⁷¹ The existence of juror bias was dramatically corroborated in a written comment submitted to the committee. An attorney from San Francisco wrote:

I am aware of a case in which a female deputy sheriff's claim of on-the-job sexual harassment was significantly influenced by the jurors' gender bias. The jurors found liability on the part of the defendants but awarded the female deputy only nominal damages. Post-trial interviews with the jurors indicated that despite seven weeks of solid evidence regarding the plaintiff's claim, the jury based its award largely on their perception of the plaintiff as a loud-mouthed "badge-waver," who had "asked for" the treatment she received from her male colleagues because she once wore a loose weave sweater to a training session where all the deputies wore civilian clothes, and because she attended rowdy parties with her fellow deputies when off-duty. In addition, the female deputy had a young son who was in daycare while she worked. She had also been divorced and remarried and led a less than orderly personal life.

The jury could not get past its perception of the plaintiff as a woman who "asked for it" by taking a "man's" job. She didn't fit the traditional female stereotype, and the jury made her pay for it. One older female juror said that she just couldn't award much money to "a woman who would go off and leave her child like that" (in daycare). The jury's perception of a male deputy who behaved in an identical manner would have been vastly different.

adoption of an admonition, as did Queen's Bench, a San Francisco women lawyer's organization.⁷²

4. INFORMAL RESOLUTION OF GENDER BIAS COMPLAINTS

RECOMMENDATION 4

Request the Judicial Council to establish a demonstration project targeting at least three counties of varying size and in disparate geographical regions of the state to develop additional and informal mechanisms for dealing with grievances concerning biased conduct, including bias based on race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status of judicial officers, attorneys, and court personnel and report the results of the project back to the council within two years.

Nothing in this recommendation would preclude other counties from voluntarily developing similar projects or individuals from pursuing any formal remedy available for claims of misconduct.

- **Need for Fair Resolution of Minor Complaints**

At the focus group for judges held at the State Bar in September 1988, judges observed and generally bemoaned the fact that they work in an environment with very little opportunity for feedback. Judges can be and often are extremely isolated, even from their colleagues, and are insulated from any source of criticism. Some judges do not even recognize the role of the presiding judge as the administrator of the court; as a result, they are not responsive to suggestions from the presiding judge about their judicial demeanor. Early recognition of a bias problem is unlikely in this context. It is easy to understand why complaints of gender bias sometimes rise to the level of judicial misconduct before any corrective action is taken.

Attorneys' reluctance to come forward has exacerbated this problem. As discussed earlier, attorneys commented that the fear of repercussions or retaliation prevented them from reporting incidents of gender bias. One attorney testified that she found that some members of a women's bar association in San Diego over which she presided were reluctant to testify at the San Diego public hearing for fear of reprisals. She stated: "As a tax attorney, I don't have an eye on the courtroom bias that we're talking about today, so

⁷² Sacramento public hearing transcript, p. 17; San Francisco public hearing transcript, p. 41; letter dated Aug. 23, 1989, from Jill Schlichtman, on file at the AOC.

when I was notified of these hearings, I sought out members, and attorneys in general to just discuss the matter. Although all of them appreciate the fact that the Judicial Council is studying the issue of gender bias, none of them was willing to, as they put it, risk their careers, or their client's cases, by testifying today."⁷³

The same attorney later referred to the expected retaliation as "shunning." The attorney stated that the association members with whom she had this discussion related specific acts of retaliation that had occurred to them but asked that these acts not be disclosed at the public hearing for fear that the attorneys and cases might be identified by the information disclosed.

Judicial retaliation can indeed be severe. In one notorious incident, an attorney who made statements to a newspaper reporter regarding bias she perceived on the part of a local judge was ultimately sued by that judge.⁷⁴

A review of case law confirmed that judges can retaliate against those who complain. One of the reasons underpinning the general rule that disciplinary proceedings against judges are confidential is the protection of complainants and witnesses from recrimination or retaliation.⁷⁵ Judges in California have been disciplined for such retaliation.⁷⁶

The minor nature of some complaints can often keep attorneys from protesting the behavior. One attorney summarized:

I really don't have anything to say that I would consider to be earth shattering, and in fact I discussed it with other people in my office. I was really concerned. I mean, am I going to really trivialize these hearings by bringing up these incidents? Are people going to say I am making mountains out of molehills and therefore undermine this work that you are trying to do? But the more I talked to people, I am convinced that even the little things have a cumulative effect, and it is important to talk about them. In fact, the more I thought about it, the more I realized that given the various stresses we all deal with in the practice of law, and I would add especially in the practice of legal aid law, the cumulative impact is significant. It is another stress. It is another something you have to deal with. It is another group of energies that you have to muster in order to

⁷³ San Diego public hearing transcript, pp. 39–40.

⁷⁴ Cooper, *Men Still Rule in Rural Courts, Women Lawyers Say* (Jan. 25, 1987) *The Sacramento Bee*, p. A10, col. 1.

⁷⁵ See, e.g., *McCartney v. Commission on Judicial Qualifications* (1974) 12 Cal.3d 512, 521 ("the provision for confidentiality . . . protects witnesses and citizen complainants from intimidation"); *Landmark Communications, Inc. v. Virginia* (1978) 435 U.S. 829, 835 ("confidentiality is thought to encourage the filing of complaints and the willing participation of relevant witnesses by providing protection against possible retaliation or recrimination").

⁷⁶ See, e.g., *Wenger v. Commission on Judicial Performance* (1981) 29 Cal.3d 615, 650–51; *Furey v. Commission on Judicial Performance* (1987) 43 Cal.3d 1297, 1319.

not let that get under your skin, to not let it undo your composure. And for that reason too, I think it is important to bring up.⁷⁷

A local, informal mechanism to deal with minor complaints would serve the following purposes: (1) it would provide for early detection of a problem of judicial conduct that could become worse and might prevent more serious problems from arising; and (2) if designed to protect complainants from reprisals, it would provide an outlet for disgruntled attorneys who might otherwise have no recourse.

- **Support in the Record**

For less serious incidents of gender bias, alternatives to contacting the Commission on Judicial Performance were favored by attorneys who attended the public hearings and regional meetings. In Fresno, for example, Ruth Ratzlaff, president of Fresno County Women Lawyers, recommended the use of gender bias liaisons at courts throughout the state. She described how the presiding judge of Fresno Superior Court acts as liaison with Fresno County's women lawyers to address gender bias and accepts submission of confidential reports. Ratzlaff stated: "This informal, confidential way of dealing with the problem, short of a nasty letter to the Commission on Judicial Performance would be, in our opinion, helpful to address concerns of gender bias."⁷⁸

Peter Keane, then president of the San Francisco Bar Association and Chief Deputy Public Defender in the City and County of San Francisco, related that he has personally approached judges on behalf of a woman deputy when there have been problems, and that this informal approach is sometimes helpful.⁷⁹ Mary Dunlap, a San Francisco attorney, also specifically recommended that an informal and efficient mechanism be developed "for litigants, attorneys, and court personnel to complain immediately and meaningfully about behavior . . . suggesting bias."⁸⁰

- **Creation of a Pilot Program**

The committee considered local efforts to establish complaint mechanisms. For example, Mendocino Superior Court Judge Conrad L. Cox created a Gender Equality Committee with a Gender Equality Officer. The committee members, both male and female, were nominated by the local women's bar association and appointed by the court. The committee was asked to "assess the issue in Mendocino County, identify any existing areas of concern, and make recommendations to the court." The Gender Equality Officer is required to "hear confidential complaints from any person who may have experienced

⁷⁷ Butte regional meeting transcript, pp. 164–65.

⁷⁸ Fresno public hearing transcript, p. 17.

⁷⁹ San Francisco public hearing transcript, p. 24.

⁸⁰ Written testimony submitted to the committee at the San Francisco public hearing, March 6, 1989, on file at the AOC.

gender bias in any aspect of the legal system" and "will be empowered to take direct action on behalf of the aggrieved party or to refer the party to an appropriate source for assistance."⁸¹ The Ventura County courts, the site of public scrutiny of the family law department and intense public debate about orders relating to child support and custody, also expressed interest in creating a similar committee. Finally, the San Francisco Superior Court has considered in gathering information about informal mechanisms for resolving gender bias complaints.

Accordingly, the advisory committee recommended that the Judicial Council commence a pilot project to develop programs for informal resolution of complaints of gender bias in the courts in at least three counties. The pilot project would provide technical assistance, monitor the progress of the committees, evaluate the results, and report back to the Judicial Council within two years. The project need not be limited strictly to questions of gender bias, but might be varied in one county to include other biases and minor demeanor problems. The Discipline and Disability Committee of the California Judges Association should ideally be consulted in the design of the project.

5. MEMBERSHIP IN DISCRIMINATORY CLUBS

RECOMMENDATION 5

Request the Judicial Council to transmit and urge consideration by the California Judges Association of the advisory committee's recommendation that the association modify its existing canon to conform to Canon 2C of the Model Code of Judicial Conduct of the American Bar Association which makes it clear that judges, as part of their ethical obligations, shall not belong to clubs that practice invidious discrimination.

There has been a growing recognition that membership in clubs that discriminate on the basis of sex and race reflects poorly on the impartiality of the judiciary. Recognizing this concern, in 1986, the California Judges Association amended Canon 2 of the Code of Judicial Conduct to provide:

*It is inappropriate for a judge to hold membership in any organization, excluding religious organizations, that practices invidious discrimination on the basis of race, sex, religion or national origin.*⁸² (Emphasis added.)

⁸¹ Letter dated Sept. 19, 1989, and enclosed press release from Mendocino Superior Court Judge Conrad L. Cox, on file at the AOC.

⁸² See former Cal. Code Jud. Conduct, canon 2C; now Cal. Code of Jud. Ethics, canon 2C.

The advisory committee did not attempt to ascertain the number of judges who have failed to comply with the amended canon. Generally, committee members have the impression that many judges have been instrumental in changing discriminatory policies in clubs; others have resigned when change did not take place. Some evidence was received at the public hearings, however, that members of the bar question whether all judges have taken steps to resign from clubs that practice invidious discrimination since the canon was amended. Both the past president of the San Francisco Bar Association and its executive director commented that there appears to be a continuation of membership in discriminatory clubs.⁸³ A witness at the San Francisco regional meeting concurred.⁸⁴ Civil litigators who attended a focus group at the State Bar Annual Meeting in September 1988 also spoke of their concerns that some judges had failed to heed the dictates of the amended code section.

Robert Raven, then president of the American Bar Association, alerted the advisory committee to ABA efforts to adopt a section of the Model Code of Judicial Conduct that would completely prohibit membership in discriminatory clubs. The 1989 ABA draft version provided: "A judge *shall not* hold membership in any organization that practices invidious discrimination on the basis of race, sex, religion or national origin."⁸⁵ (Emphasis added.) This clear mandate—"shall not hold"—is far stronger language than the "[i]t is inappropriate" phrase adopted by the California Judges Association.

The advisory committee determined that, to ensure compliance with the code section and the original intent of the California Judges Association, the association should consider adopting the clearer, mandatory language proposed by the ABA. Adoption of this language would assist judges in understanding their ethical duties and would dispel the appearance of impropriety created when judges belong to discriminatory clubs. A prohibition on membership with a growing body of cases upholding laws that prohibit clubs that operate for business purposes from practicing invidious discrimination.⁸⁶

In summary, the committee found that prohibiting judicial membership in discriminatory clubs would directly benefit the judiciary because (1) it would foster collegiality and lessen the deleterious effect discriminatory clubs have on judges whose membership is barred; (2) it would equalize access to community involvement for male and female judges and minority and nonminority judges; (3) it would dispel the appearance of impropriety caused by judicial memberships; (4) the impact of judicial resignations prompted by adoption of a prohibition may influence clubs to change their

⁸³ San Francisco public hearing transcript, pp. 20, 28.

⁸⁴ San Francisco regional meeting summary, p. 3.

⁸⁵ Draft Model Code of Jud. Conduct, canon 2C (November 1989).

⁸⁶ See, e.g., *Board of Directors of Rotary International v. Duarte* (1987) 481 U.S. 537; *New York State Club Association Inc. v. City of New York* (1988) 487 U.S. 1.

discriminatory practices; (5) continued membership in discriminatory clubs may adversely affect a judge's ability to seek elevation to a higher court.

B. CONDUCT OF ATTORNEYS AND RELATED ISSUES

FINDINGS

Changing judicial attitudes about gender will not, by itself, cure the problems of bias in our courts—attorneys must change as well. As Robert Raven testified at the Sacramento public hearing: "Although gender bias by judges is a significant problem, the task force[s] around the country . . . have repeatedly heard that *the greatest problem lies with the treatment of women by . . . many male attorneys*, and as leaders of the profession and members of the firm, we must come down hard on such behavior. It cannot be tolerated."⁸⁷ (Emphasis added.)

Bar leader Margaret Morrow emphasized the acute need to focus as well on attorney conduct:

. . . [T]his focus on the judiciary, almost to the exclusion of lawyers is not only unjustified, but unjustifiable. Both the New Jersey and the New York Task Forces on Gender Bias in the Courtroom, concluded that male attorneys, not judges, were the courtroom actors who exhibited the highest incidence of biased conduct.

Attorneys are not circumscribed in their conduct by the imperative which most judges feel to administer a fair, or at least an apparently fair courtroom. Attorneys are not called upon to make the ultimate decisions, and in doing so, to evaluate whether the decision is the product of any form or species of bias.

Rather, they approach litigation with only advocacy in mind. In the win/lose atmosphere of a courtroom, where persuasion is the name of the game, an attorney concentrates on the main objective, and subconsciously, or worse, as part of a conscious strategy, acts on his or her own biases, and plays on the biases of others to achieve the desired result.

This pattern will not change until the attitudes which underlie it change. *And the fact of the matter is that despite all of the advances which women have made in the business world and in society as a result of the women's movement, the process of changing attitude is glacially slow.*⁸⁸ (Emphasis added.)

⁸⁷ Sacramento public hearing transcript, p. 136.

⁸⁸ Los Angeles public hearing transcript, pp. 34–35.

While this chapter has appropriately focused on judicial conduct, exclusion of attorney conduct, would, Morrow's words, be "unjustified and unjustifiable," both because the advisory committee concluded that attorney conduct is more offensive and egregious than judicial conduct and because of the importance of these findings to the bar. This section therefore considers the nature and extent of biased attorney conduct, the context in which it occurs, and possible remedies for it.

In this regard, the advisory committee found that:

1. Examples of attorney conduct exhibiting gender bias abound, and they are both more frequent and more severe than those involving judicial conduct.
2. Attorney conduct evidencing gender bias occurs in a climate of decreasing civility in the profession.
3. Attorney conduct that exhibits gender bias includes forms of the following types of behavior:
 - (a) Words and acts that focus on the sexual attributes or personal appearance of women participants in courtroom proceedings;
 - (b) The manipulation of gender issues as a trial tactic;
 - (c) Expression of the belief by word and deed that women should not be lawyers or are inferior as advocates;
 - (d) Discrimination against women in bar activities;
 - (e) Words or acts evidencing gender bias that are committed with the encouragement or participation of the judge.
4. Appropriate remedies for attorney conduct exhibiting gender bias include adoption of a rule of professional responsibility, inclusion of questions pertaining to the rule on the bar examination, and initiation of extensive education programs for attorneys and for members of the Judicial Nominees Evaluation Commission.
5. It is in the interest of the entire profession, the judiciary, and the public that the reputation of the legal profession be improved. Eliminating gender bias in the courtroom will serve that laudable goal.
6. The use of gender-neutral language by all court participants is essential to ensuring gender fairness and the appearance of gender fairness in the courts.

7. Women attorneys are often excluded from the most lucrative and prestigious appointments as counsel in civil matters, and local practices and procedures should be adopted to correct this problem.
8. Women attorneys perceive that they have fewer opportunities for advancement than do men attorneys, a situation directly related to the profession's failure to respond adequately to the difficulties of balancing home and family.
9. Attorney membership in and business use of private clubs that practice invidious discrimination is detrimental to both women and minority attorneys.

DISCUSSION AND ANALYSIS

1. ATTORNEY CONDUCT EXHIBITING GENDER BIAS

RECOMMENDATION 6

Request the Judicial Council to transmit and urge consideration by the State Bar of the following advisory committee recommendations:

(a) The State Bar should adopt a Rule of Professional Conduct analogous to ABA Model Code of Judicial Conduct sections 3B(5) and (6) which would create a duty for all attorneys not to manifest bias on any basis in any proceeding toward any person, including judges and court employees, with an exception for legitimate advocacy when race, sex, religion, national origin, disability, age, sexual orientation, socioeconomic status, or other similar factors are issues in the proceeding;

(b) The Committee of Bar Examiners should include questions pertaining to the amendment to the Rules of Professional Conduct referred to in (a) above on the bar examination in the same manner as other questions on professional conduct; and

(c) The State Bar should conduct a major ongoing effort relating to education of the bar on issues of gender bias. Gender bias issues should be

included as part of the following educational materials or programs: (i) materials in State Bar reports; (ii) section newsletters; (iii) programs at the annual meeting; (iv) programs at bar leaders' meetings; (v) lawyer education programs; (vi) programs developed as part of mandatory continuing legal education; and (vii) training programs for members of the Judicial Nominees Evaluation Commission.

- **Gender Bias by Attorneys: More Frequent and More Severe**

At each regional meeting, attorneys appeared to agree that acts of gender bias by attorneys were too numerous to mention; indeed, they characterized these acts as commonplace, everyday occurrences. They agreed, too, that the nature of the behavior appeared to be more severe and that incidents occurred more frequently than incidents of judicial conduct exhibiting gender bias. The views expressed at the regional meetings confirmed the results of a 1985 questionnaire that the State Bar Committee on Women in the Law distributed to women attorneys practicing in small firms. The results of the questionnaire were summarized, in part, as follows:

About 40 percent of the women responding have suffered gender bias in the courtroom. Usually the problems arise from opposing male lawyers, not from the bench. The problems take the form of dirty tricks that border on unethical tactics, interruptions and talking over the women and making patronizing remarks . . . Gender bias had no correlation to number of years in practice.⁸⁹

A former courtroom clerk who had worked in the courtroom for 17 years and later became an attorney corroborated this conclusion.⁹⁰ Peter Keane, then president of the San Francisco Bar Association, also stated:

I supervise approximately 66 deputy public defenders in San Francisco who work in the courts on a daily basis. The observations that I have from the women attorneys are considerably distinct from the observations I have from the male attorneys.

. . . [T]he comments they come back to me with regarding sexist remarks that are made to them in the courts on a virtual daily basis by judges, by

⁸⁹ Results of Small Firm Questionnaire, summarized in letter dated Sept. 11, 1986, from Christine Curtis, then chair, State Bar Women in the Law Committee, on file at the AOC.

⁹⁰ Orange County regional meeting summary, p. 12; written comment, in Summary of Written Materials Received, p. 24.

district attorneys, by probation officers, by police officers, are quite alarming.⁹¹

- **Acts of Gender Bias in a Climate of Increasing Incivility and Decreasing Professionalism**

Both Morrow⁹² and Patricia Phillips, a member of the Board of Governors of the State Bar,⁹³ spoke about the lack of professionalism and the common belief that any trial tactic is legitimate that now characterize the practice of law. Morrow described the debate of the Los Angeles County Bar Association on a proposed standard of judicial administration that created a judicial duty to avoid and prevent gender bias in the courtroom.⁹⁴ She stated:

These underlying attitudes were evident, I think, in the discussions of our board concerning the adoption of the standard of judicial administration What they seemed to be saying was that bias is part of a human experience, and that as advocates, they could not refrain from acknowledging its existence and its influence on the adversarial process, and utilizing it to the benefit of their clients.

It seems, therefore, to me, that we must not only sensitize members of the profession more fully on the issue of gender bias, but must also work to modify commonly held perceptions concerning what are acceptable strategies and tactics in the name of advocacy. On both fronts, *it is time for the bar to put its own house in order.*⁹⁵ (Emphasis added.)

Under Morrow's leadership, the Los Angeles County Bar promulgated a set of litigation guidelines in an effort to transform the legal culture's value system and the norm of acceptable advocacy. As recognized by Morrow in her testimony:

Law and legal institutions were formed, and have been controlled for many years by men. Expectations of what constitutes appropriate conduct on the part of an attorney are male expectations.

Litigation and the negotiation of business transactions are conducted using methods and tactics which reflect fundamentally male patterns of behavior and male interaction. Until there is some recognition of this fact, and modifications of attitudes based on it, gender bias will continue to exist within the profession.⁹⁶

⁹¹ San Francisco public hearing transcript, p. 17.

⁹² Los Angeles public hearing transcript, pp. 34–37.

⁹³ *Id.*, pp. 45–46, 51.

⁹⁴ The standard was adopted. See Cal. Standards Jud. Admin., standard 1, eff. Jan. 1, 1987.

⁹⁵ Los Angeles public hearing transcript, pp. 36–37.

⁹⁶ *Id.*, p. 36.

Recognizing the implications of the lack of courtesy in the profession, the guidelines promulgated in Los Angeles encourage civility and courtesy. They state:

Many believe that relations between lawyers have so deteriorated that our profession nears a crisis—one that not only implicates how we deal with each other but threatens our usefulness to society, the ability of our clients to bear the cost of our work and the essential values that mark us as professionals.

There have always been lawyers who have abused each other and the judicial system, but they seemed to be few in number. Now, some perceive, abusive conduct is gaining new adherents cloaked in the mantle of forceful advocacy. They proclaim that clients are best served by the intimidation of opponents, a relentless refusal to accommodate and the use of tactics that impose escalating expense on an adversary. Be difficult and the other side may cave, they think.

The Committee on Professionalism of the Los Angeles County Bar Association thinks otherwise.⁹⁷

While noting the right of free speech, the guidelines encourage attorneys to consider the harm to the judicial system inflicted when disparaging remarks are made about opposing parties, counsel, witnesses, jurors, court personnel, or the judge.

Judges likewise have recognized what some describe as a crisis in the profession. Judge Roger J. Miner, United States Circuit Court of Appeals for the Second Circuit and adjunct professor at New York Law School, has written:

It should go without saying that lawyers should treat each other with decency and respect. The vigorous representation of clients is not inconsistent with civility. *Yet there is a civility crisis of major proportions involving the bar.* Our ethical standards make it crystal clear that ill feelings between clients should not influence relations between lawyers, that a lawyer should not refer to opposing counsel in a derogatory way and that haranguing tactics interfere with the orderly administration of justice.⁹⁸ (Emphasis added.)

- **Attorneys Exhibit a Wide Range of Behavior Evidencing Gender Bias**

Focus on sexual attributes of women in the courtroom and elsewhere. Women attorneys reported that they have been subjected by male attorneys to sexual propositions, offensive jokes, sexual innuendoes, and discussions of sexual attributes. One attorney

⁹⁷ Los Angeles County Bar Assoc. Litigation Guidelines, attached to Apr. 28, 1989, Memorandum from State Bar President Colin W. Wied, on file at the AOC.

⁹⁸ Miner, *Lawyers Owe One Another* (Dec. 19, 1988) National Law Journal 13–14.

related that a deputy district attorney called her after hours and told her that if she agreed to go out with him, he would dismiss the charges against her client.⁹⁹ A female attorney from Los Angeles reported that she became embroiled in a dispute with opposing counsel in a complex civil matter. Apparently angered at something she had done, opposing counsel wrote her a letter suggesting that she had "only two workable parts and that those parts were interchangeable." She attached the letter in a motion for sanctions. The judge and the courtroom responded with laughter. In two subsequent letters, opposing counsel offered to explain to her the body parts to which he had referred.¹⁰⁰

Female court employees are similarly treated by some male attorneys. One attorney in Butte County told of overhearing a male attorney audibly discussing the court clerk's nipples.¹⁰¹

Use of gender as a trial tactic. Attorneys reported that men and women use gender as a tactic in the courtroom. Tactics include name calling; disparagement of female witnesses, parties, and experts; attempts to dominate the courtroom or chambers discourse through constant interruptions of women participants; and manipulation of the perceived biases of jurors in jury selection. In addition, flirtatious behavior, sexual comments, terms of endearment, and other forms of inappropriate conduct are used as a means to disconcert opposing counsel and undermine her representation of the client.¹⁰²

Disrespect for female witnesses and expert witnesses, such as the failure to accord them their appropriate titles, was reported to be common. One woman attorney believed that she received lower damages in a case involving claims of emotional distress because her client, her client's treating physicians, and her experts were all women. She believes that the totality of the effect on the jury was to make her case less believable.¹⁰³ Another attorney reported:

It's been my observation in my trial practice that *female witnesses are not attributed the same amount of credibility as male witnesses*. That a man walks into the courtroom under the assumption that he'll be telling the truth without exaggeration.

I have found that oftentimes my female witnesses have been subjected to what I feel is improper cross-examination, being subjected to an incredible amount of questioning about, are you really telling the truth? Aren't you exaggerating? Far beyond that which the court allows my male witnesses to be subjected to.¹⁰⁴ (Emphasis added.)

⁹⁹ San Francisco regional meeting transcript, p. 175.

¹⁰⁰ Los Angeles regional meeting summary, p. 13.

¹⁰¹ Butte regional meeting summary, p. 11.

¹⁰² Sacramento regional meeting summary, pp. 11–12.

¹⁰³ Orange County regional meeting summary, p. 16.

¹⁰⁴ Los Angeles regional meeting summary, p. 18.

Another woman attorney commented about her experience with expert witnesses:

My company happens to be a leader, in our industry, of having women in positions of authority. And our director of corporate planning is a woman, a young woman, a very attractive woman.

And I've watched opposing counsel take her deposition. And first she has to justify her education in a way I've never seen a man asked to justify his education.

Going through work experience from age 16. Not where did you go to college and where did you get the advanced degree, but just going way back. And what kind of background did you have and on and on and on and did you really prepare this memo that led to the end of this division or did your boss tell you what to conclude, and is it really your job to investigate and analyze all the division on an ongoing basis. Isn't it really that you're under the direction and under the control of all these men. I mean, you're not really a senior VP.

It's sort of the tone of the questioning. And I've just never seen a male expert treated in that way. You know, what's your education. They give their education. And what's your job and then they give their job.

And I just—I'm always amazed when I see it happen but I see it happen time and time again.¹⁰⁵

The use of gender in jury selection is at the heart of the controversy about what are legitimate trial tactics. Some attorneys argue that taking advantage of juror biases is smart lawyering.¹⁰⁶ For example, one attorney delivered a lecture on jury selection in complex commercial cases and distributed a prepared memorandum to the attendees. This memorandum included the following statement: "Women are much more opinionated than men, less susceptible to reason, and less likely to change their minds based upon the arguments of others." In explaining his remark, the attorney asserted that selecting a jury in a civil case on the basis of bias and generalizations about people was not only permissible, but in fact an attorney's duty.¹⁰⁷ Other attorneys disagree, contending that jury selection based on supposed stereotypes disserves the client and borders on unethical conduct.¹⁰⁸

Belief that women should not be lawyers. Participants at the regional meetings reported that some attorneys apparently still believed that women have no business being

¹⁰⁵ Los Angeles regional meeting summary, p. 3.

¹⁰⁶ San Francisco regional meeting transcript, p. 136.

¹⁰⁷ Letter from Judge Judith McConnell, dated March 13, 1989, and response dated March 29, 1989.

¹⁰⁸ San Francisco public hearing transcript, pp. 21–22.

lawyers. For example, one woman attorney from San Bernardino related an anecdote in which a male defense attorney told her that "when women lawyers become D.A.'s they are unreasonable and impossible to deal with." He continued, "I'll take that generalization one step further—no woman anywhere should even be a lawyer, they cannot do the job!"¹⁰⁹ Another woman attorney reported that when she said she planned to attend a professional meeting, a male colleague asked her whether she did not have anything better to do—like shopping.¹¹⁰

Discrimination against women in bar activities. One newly admitted woman attorney reported her perception that in Shasta County de facto separate bar associations exist. According to this witness, the women attend the women's bar group, and the men attend the general bar association. She said that women do not attend the men's group in part because the activities revolve around sports or social occasions with other women who are not lawyers.¹¹¹

The advisory committee received two letters from Shasta County disputing this attorney's perception of separate bar organizations. In these letters, a municipal court judge and a court commissioner stated that women do attend meetings of the Shasta County Bar Association and have served as officers and committee chairs in that organization. These letters further stated that the women's group serves as an informal mechanism to promote collegiality among women lawyers and paraprofessionals—not as their only outlet for bar participation.¹¹²

In other testimony about bar activities, a past president of the Fresno County Bar Association described a dispute involving the selection of the first woman president of that association. Prior to 1985, it was the custom and practice for the president of the association to choose the vice president, who would then succeed the president. This practice had been the unquestioned tradition for many years. In 1984, the then president of the association chose a woman for his vice president. Suddenly, the customary practice was challenged as undemocratic, and two others were proposed as vice presidents. A vote was conducted, and the woman the president had designated won by a narrow margin. At the time this public hearing testimony was received, no other woman had served as president of the Fresno County Bar Association.¹¹³

The committee received a report of gender bias at the state level as well. An invitation to a reunion for past and present members of the State Bar Board of Governors requested the members to "join your fellow governors and their nice girls."¹¹⁴

¹⁰⁹ Written comment, in Summary of Written Materials Received, p. 24.

¹¹⁰ Orange County regional meeting summary, p. 14.

¹¹¹ Butte regional meeting summary, p.11.

¹¹² See written comments dated May 21, 1990, and June 27, 1990, on file at the AOC.

¹¹³ Fresno public hearing transcript, pp. 229–301.

¹¹⁴ Bay, *Bar Talk* (Apr. 20, 1988) San Francisco Recorder 10.

Attorney conduct encouraged or joined by the judge. The consensus among attorneys who testified at the regional meetings was that the worst form of bias occurred when opposing counsel and the judge appeared to collude. For example, an attorney tells an off-color joke and the judge applauds. The attorney and the judge are friends, and engage in sports talk, or chat about mutual acquaintances and social events both attended. In this situation, the woman attorney—and often her client—believe that this collusive behavior almost guarantees them a negative outcome.¹¹⁵

- **Appropriate Remedies: A Rule of Professional Conduct and Education**

In 1986, the State Bar Women in the Law Committee proposed adoption of a rule of professional responsibility that would prohibit attorneys from engaging in conduct manifesting gender bias. The proposed language read:

A member of the State Bar shall not engage in any conduct concerning his or her handling of any legal proceeding that would directly or indirectly discriminate against any participant in the proceeding, or would manifest bias, on the basis of sex, color, race, religion, national origin, ancestry, physical handicap, age, medical condition, marital status, or sexual preference.¹¹⁶

Later, the 1987 State Bar Conference of Delegates made a similar proposal. Conference of Delegates Resolution 5–7 recommended that the following language be added to the Rules of Professional Conduct:

[A member shall] refrain from engaging in conduct that exhibits or is intended to appeal to or engender, bias against a person on account of that person's race, color, religion, sex, national origin, sexual orientation or disability, whether that bias is directed to other counsel, court personnel, witnesses, parties, jurors, judges, judicial officers or any other participants.¹¹⁷

The Board Committee on Professional Responsibility and Conduct objected to these proposals as overbroad. For example, in response to the Conference of Delegates' resolution, the board stated: "it reaches, *inter alia*, challenges to jurors and cross-examination of witnesses which, though relevant, could be objected to on the grounds of bias. Thus, the proposed subdivision is fraught with the potential for misuse by advocates and parties."¹¹⁸ The State Bar deferred further consideration of these

¹¹⁵ See, e.g., Orange County regional meeting summary, p. 13; Los Angeles regional meeting summary, p. 13.

¹¹⁶ Updated memorandum from the Committee on Women in the Law to the State Bar Board of Governors, Second Interim Report, Committee Recommendations for State Bar Action of Gender Bias in the Courtroom.

¹¹⁷ Memo dated Jan. 5, 1988, to members of the Board Committee on Professional Standards, on file at the AOC.

¹¹⁸ *Ibid.*

proposals pending the completion of this report, with the hope that specific examples of biased conduct might be added to the language of the proposed rule to reduce its ambiguities.

The advisory committee debated at length whether a rule of professional conduct prohibiting bias should be adopted. It considered other remedies as well, such as a code of professional courtesy or voluntary creeds entered into by law firms that contain provisos against biased behavior. The issue was also thoroughly debated at the focus group conducted for civil litigators at the State Bar Annual Meeting in September 1988.

Support for the adoption of a rule was expressed at the public hearings.¹¹⁹ For example, at the Los Angeles public hearing, Margaret Morrow described the debate on the proposed rule of professional conduct, stating:

The State Bar's Committee on Women in the Law first proposed such a rule in 1986, and the reaction of many in my Bar Association at that time was uneasiness. This uneasiness was couched in terms of concerns about the vagueness of the rule.

What kind of conduct would it proscribe? Might not it lead to ancillary disputes during litigation over whether conduct was or was not motivated by bias? How could an attorney be disciplined based on a rule which gave no guidelines as to what kind of conduct was prohibited?

Those were the questions. But the reality underlying the questions was a lack of consensus about the boundaries of appropriate advocacy, and the propriety of playing on bias as a part of the litigation process.

I think the same debate would ensue today if a Rule of Professional Conduct of this type were to be proposed; and I think it will always ensue until members of the bar generally are convinced that a real problem exists, and that it is a problem which undermines the integrity of the justice system, and contravenes the duty of lawyers to ensure that justice is done.¹²⁰

The advisory committee became convinced that incorporating a duty to prevent bias into a rule of professional conduct would be the most effective way to eradicate biased conduct among attorneys. The committee was persuaded that attorney conduct demonstrating gender bias is widespread and deleterious. To quote Morrow, "a real problem exists," a problem that undermines the integrity of the entire justice system. If judges are charged with preventing bias from occurring in the courtroom, attorneys should likewise be precluded ethically from exhibiting the same behavior. The duties

¹¹⁹ See, e.g., Fresno public hearing transcript, p. 34.

¹²⁰ Los Angeles public hearing transcript, pp. 39–40.

should be parallel. The evidence that incivility and unprofessionalism increasingly characterize the legal profession and poison the courtroom atmosphere further supported the committee's conclusion that such a rule is necessary.

The preferred language for establishing an attorney duty to refrain from biased conduct would conform to the language in the parallel Model Judicial Code provision, which has had the benefit of national debate and discussion. In the committee's view, the exception for legitimate advocacy contained in the model code sufficiently clarifies an attorney's duty and meets the objections raised in the debate on this issue.¹²¹

A rule of professional responsibility will nonetheless have little effect without accompanying educational programs. Attorneys expressed a desire for educational programs that address questions of bias, both in substantive areas of the law and in courtroom conduct.¹²² The committee concluded that the State Bar should develop a comprehensive educational program on gender bias and make it a part of mandatory continuing legal education. Gender bias should also be covered in State Bar reports, newsletters, programs at the annual meeting, and programs at bar leaders' conferences. Moreover, questions regarding the duty to refrain from bias should be contained in professional responsibility courses and asked on the bar examination.

Another effective check on attorney behavior is detection of acts of bias by the Judicial Nominees Evaluation Commission if the offending attorney ever seeks judicial office. The commission's practices in this regard were discussed at the focus group for civil litigation attended by a former member of the commission and at the Sacramento public hearing. Although the commission does not frequently find complaints of bias in a candidate's record, they do occur. Unless deemed totally without merit, such complaints seriously hamper the likelihood of the candidate's success.¹²³ There was also public hearing testimony, however, that the commission's role in eliminating biased attorneys from consideration for the bench could be strengthened through broader education of

¹²¹ See ABA (Proposed) Model Code of Jud. Conduct section 3B(6), creating an exception to a judge's duty to prevent attorney bias. The exception exempts "legitimate advocacy when race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, or other similar factors, are issues in the proceeding." While issues of bias and issues of legitimate advocacy may sometimes collide, a prohibition against bias is no more vague than any number of ethical rules lawyers are accustomed to following. As with other rules, meaningful commentary can accompany the rule that will enlighten counsel sufficiently to define the ethical duty described. Further definition will be worked out on a case-by-case basis, under the totality of the circumstances, which is a legitimate task for a disciplinary body to perform. The committee rejected the notion that more specific examples of exempted behavior should be catalogued in the rule. It is worth noting, however, that an attorney exercising a peremptory challenge against a woman in a jury trial when he or she fears that woman might damage the client due to a bias she may have could be considered legitimate advocacy. In contrast, an attorney demeaning a woman witness in order to play on juror prejudice could not be considered legitimate advocacy.

¹²² See Los Angeles public hearing transcript, pp. 34–35; San Diego public hearing transcript, p. 44.

¹²³ Sacramento public hearing testimony, pp. 59–61 (testimony of Catherine Sprinkles).

commission members on gender and other types of bias.¹²⁴ Accordingly, the advisory committee recommended that the bar institutionalize regular training of commission members on bias issues.

2. USE OF GENDER-NEUTRAL LANGUAGE

RECOMMENDATION 7

(a) Request the Judicial Council to adopt a rule of court regarding gender-neutral language in local court rules, forms, and documents which would make the existing standard of judicial administration on this subject mandatory;

(b) Request the staff of the AOC to review the text of all statewide rules, standards of judicial administration, and forms and recast them in gender-neutral language where necessary within a reasonable time; and

(c) Request the Judicial Council to adopt a rule of court which would require the use of gender-neutral language in all jury instructions by January 1, 1992, and to adopt in the interim, effective January 1, 1991, a rule that would require attorneys and judges to recast all standard jury instructions (CALJIC and BAJI) in gender-neutral language.

• **Objections to Language That Is Not Gender Neutral**

Witnesses who testified at both the public hearing and regional meetings objected to the use of language that is not gender-neutral, especially the use of masculine generic terms to refer to both men and women. One Los Angeles attorney shared a speech she had delivered to a gathering of family law judges. She stated:

Finally, I think discrimination by careless language must be dealt with as uncompromisingly as discriminatory actions. *If we can clean up our language, we can eliminate a certain amount of gender bias.* Language is not insignificant. Words are the tools of our trade. Language not only reflects how we think but affects it as well. When I was in college, I briefly considered becoming a lawyer, but at the time, lawyers were "He's" and I dismissed the thought until much later. Calling counsel "gentlemen"

¹²⁴ Sacramento public hearing transcript, pp. 76–77 (testimony of commission member Nanci Clinch).

as a generic term implies that women do not belong to the class of people known as lawyers—and our clients do not miss the inference.¹²⁵ (Emphasis added.)

Although examples of the refusal to use gender-neutral terms are numerous, sometimes the result is unexpected. For example, a prosecutor arguing a case before the Supreme Court of California referred to the justices as "you guys." Justice Joyce L. Kennard reportedly asked the prosecutor, "Does that include me?"¹²⁶ Antagonism toward women attorneys who prefer to use Ms. has been noted, as well as against those who retain their maiden name.¹²⁷

• Nature of Gender-Based Language and Consequences of Its Use

Dr. Campbell Leaper, assistant professor of psychology at the University of California at Santa Cruz, explained at the San Francisco public hearing that language can be used to demean women in three specific ways. First, words can be selected that ignore women, that is, that refer to "he" or "man" exclusively. Second, language can be used that tends to define or stereotype women. Examples of this usage include the gratuitous modifier ("lady lawyer") or the definitional phrase that discloses more information about a woman than is disclosed about a man (for example, the use of Mrs. to define marital status). Finally, phrases can be employed that specifically trivialize or demean women ("I'll have my girl do it"). According to Dr. Leaper, gender-based language may cause the listeners to respond differently to men and women. He noted that approximately 20 studies have been completed consistently showing that people do not think of males and females equally when they hear the masculine generic used.¹²⁸

There is also some evidence that language that does not refer to both sexes equally and specifically may mislead jurors into believing that the meaning applies only to one sex. One attorney wrote: "The lack of gender neutral language in jury trials is a serious problem. Picture a male defendant and a female victim at a criminal trial. The female testifies that he raped her, and the male testifies that he did not. When the court reads the instructions to the jurors concerning the testimony of witnesses he always says 'he' or 'him.' As the jurors sit there they think the judge is referring to the defendant."¹²⁹

Similarly, Dr. Leaper testified about a Washington criminal case that resulted in the conviction of a woman for murdering a child molester who was in her home. A jury

¹²⁵ Written comment received May 9, 1988, Los Angeles, on file at the AOC.

¹²⁶ "'You Guys' Draws Icy Reply" (July 1989) Los Angeles Times.

¹²⁷ See, e.g., the notorious Pennsylvania case in which a woman attorney was held in contempt for her refusal to be known by her husband's last name in the course of a court proceeding. *Disorder in the Court* (Nov. 6, 1988) The Sacramento Bee.

¹²⁸ San Francisco public hearing transcript, pp. 67–71.

¹²⁹ Written comment, July 18, 1988, on file at the AOC.

instruction regarding a person's right to protect "his" home was given. The defense appealed, in part on the ground that it was likely that the jury did not think the instruction applied to the defendant because she was female. As part of the appeal, a study was undertaken in which college students read the case and responded to two versions of the jury instructions. The researcher found that the students thought the defendant acted in self-defense more frequently when the instructions were given in a gender-neutral form than when the masculine generic was used.¹³⁰

A related issue is the effect that jury instructions written in the male generic may have on female jurors. One writer has concluded that women participate on juries less because of their cultural tendency to choose subordinate rather than dominant roles.¹³¹ A way to combat this tendency is to use gender-neutral language to remind women jurors that all of the instructions and other information are equally applicable to them.

• The Debate

The debate about transforming the language with which lawyers practice their profession and judges make decisions into gender-neutral terms is a surprisingly vigorous one. Many attorneys and judges support rules and procedures that require our legal writing and speaking to be gender-neutral. Others, however, are uneasy about the prospect. The late Professor Irving Younger wrote a provocative piece on gender-neutral language in his regular column on writing in the *ABA Journal*.¹³² The piece elicited many letters in opposition to the views expressed.

The debate also emerged among the Los Angeles Superior Court committees that draft and approve the standard jury instructions used in California courts. Los Angeles Superior Court Judge Aurelio Munoz, chair of the Committee on Standard Jury Instructions—Criminal (CALJIC), reported that the committee redrafted the language in the new edition of the standard instructions in gender-neutral language.¹³³ In contrast, the Committee on Standard Jury Instructions—Civil (BAJI) did not change the instructions in the same manner.¹³⁴ The committee apparently concluded that the use of "he" to signify both genders was grammatically correct and that use of other forms would

¹³⁰ San Francisco public hearing transcript, pp. 72–73; see also *State v. Wanrow* (1977) 88 Wash.2d 221 ("reversing conviction and finding jury instructions invalid; court notes that the persistent use of the masculine gender leaves the jury with the impression the objective standard to be applied is that applicable to an altercation between two men") (alternative holding).

¹³¹ Marder, *Gender Dynamics and Jury Deliberations* (1987) 96A Yale L. J. 593, 597–98.

¹³² Prof. Younger asserted that the use of the pronoun "he" to signify both he and she is grammatically correct and that there is no adequate substitute that is gender-neutral. Younger, *The English Language Is Sex-Neutral* (June 1, 1986) 72A ABA Journal 89.

¹³³ Los Angeles public hearing transcript, pp. 232–33.

¹³⁴ *Id.*, pp. 79–81.

be too cumbersome. BAJI decided to use gender-neutral language, however, as it adds and modifies instructions.

The committee learned that many California judges are now laboriously rewriting jury instructions in gender-neutral language. Precious judicial time would be saved if all the standard instructions were modified so that judges need no longer perform this task themselves.

- **Growing Trend Toward Gender-Neutral Language**

Standards of Judicial Administration, section 1.2 requires gender-neutral language in court documents whenever possible providing that:

Each court should use gender-neutral language in all local rules, forms, and court documents and should provide for periodic review to ensure the continued use of gender-neutral language. These changes may be made as local rules, forms, and documents are modified for other reasons.

Courts across the state reported taking extensive steps to comply with this standard.

The California standard appeared to be part of a larger national effort to make state laws and procedures gender-neutral.¹³⁵ For example, the revised ABA Model Code of Judicial Conduct was drafted in gender-neutral language.¹³⁶

- **Advisory Committee Recommendations**

Considering all the evidence, the advisory committee favored the use of gender neutral language for the following reasons: (1) precision in language is the attorney's tool—specific reference to both men and women when both are intended is clearer; (2) clarity of construction is not as important as clarity of meaning. Using "he" to mean "he" and "she" may be misunderstood as excluding women and might affect the outcome of the case; (3) there is a growing national trend that favors the use of gender-neutral language; (4) exclusion of one sex in language usage potentially offends an entire class of people.

To achieve the use of gender-neutral language, the committee recommended that Standard of Judicial Administration 1.2, set forth above, become a rule of court. Further, the committee recommended that all jury instructions be submitted to the jury in gender-

¹³⁵ See Corbett, *Making State Laws Gender Neutral* (September - October 1987) Simply Stated: Newsletter of the Document Design Center American Institutes for Research, pp. 1-2, 4.

¹³⁶ *The New Code of Judicial Conduct: How Will it Affect You?* (1989) 28 Judges' Journal 56.

neutral language by January 1, 1991, and that an interim standard of judicial administration be adopted that would encourage the recasting of all jury instructions in gender-neutral language during the interim period.

3. APPOINTED COUNSEL

RECOMMENDATION 8

Request the Judicial Council to approve in principle and instruct staff and the appropriate committee to draft:

(a) A Standard of Judicial Administration for trial courts that would provide a model local rule setting forth a policy with respect to the appointment of counsel in civil cases, including family law, and appointments as arbitrators and receivers, to ensure equal access for all attorneys regardless of gender, race, or ethnicity. The standard setting forth the model local rules shall include (i) a recruitment protocol to ensure dissemination to all local bar associations, including women and minority bar associations; (ii) a written description of the selection process which includes a statement of minimum qualifications; application procedure, and selection procedure; and (iii) regularly scheduled recruitment;

(b) A rule of court requiring that each court establish by local rule a policy for the appointment of counsel in civil litigation, as specified above. The rule should provide that if a court fails to adopt a local rule regarding appointed counsel, the model rule contained in the standards shall be deemed the local rule; and

(c) A Standard of Judicial Administration that would provide for the selection of attorneys for bench, bar, and other court-related committees in a manner that would provide for equal access to selection for all attorneys regardless of sex, race, or ethnicity.

The committee received reports that women attorneys believe that they are less frequently appointed as arbitrators, receivers in complex civil cases, temporary judges,

and members of settlement panels.¹³⁷ In some counties, it has been reported that women are "bumped" from appointment panels at the whim of the judge who oversees the process.¹³⁸ Some of these positions are remunerative; others are valuable for their high profile and their potential to enhance the attorney's reputation and credentials. The subject of fairness in the appointment of counsel is discussed at greater length in the chapter on criminal and juvenile law. That discussion will not be duplicated here. While the majority of information received by the advisory committee pertained to appointments in criminal matters, the committee determined that neutral procedures should be adopted for civil appointments as well. Accordingly, the committee recommended a standard of judicial administration and rule for civil cases that mirror the criminal appointment proposals. The proposed standard would include a model rule requiring a recruitment protocol, a written description of the selection process with a statement of minimum qualifications, an application procedure, a selection procedure, and regularly scheduled recruitment. These procedures will ensure that counsel are appointed on the basis of ability and will help to prevent the exclusion of any group.

4. ATTORNEY EMPLOYMENT

RECOMMENDATION 9

Request the Judicial Council to transmit and urge consideration by the State Bar of the following advisory committee recommendations:

(a) The State Bar should adopt a Rule of Professional Responsibility prohibiting lawyers from discriminating in employment decisions and from engaging in sexual harassment; and

(b) The State Bar and all appropriate sections and committees should vigorously support and take immediate steps to adopt the recommendations of the Women in the Law Committee submitted in its recent survey of women and the practice of law in California.

The changes created by the entry of women into the legal profession in record numbers during the past 20 years helped to trigger the studies of gender bias occurring throughout the country. While entry into the profession is no longer a pressing issue, the

¹³⁷ See Report of Small Firm Questionnaire State Bar, Women in the Law Committee, undated memorandum; San Francisco regional meeting testimony, p. 68; Butte regional meeting summary, p. 3.

¹³⁸ See, e.g., written comment, received July 8, 1988, on file at the AOC.

terms and conditions faced by practicing women lawyers pose a number of concerns. As Professor Deborah Rhode, an expert in gender and the law, has written:

Although women have been moving into upper level professions in greater numbers, they have not attained the positions of greatest power, prestige, and economic reward. *Formal barriers to entry have fallen, but informal obstacles to advancement remain.* The persistence of such obstacles has, in turn, added a new dimension to the traditional debate. The question is not simply how well women can accommodate the demands of male-dominated professions, but also how these professions must change to accommodate women.¹³⁹ (Emphasis added.)

This report has focused not on employment conditions for women attorneys but rather on gender bias in judicial decision-making and the courtroom environment. Nonetheless, the advisory committee determined that attorney employment issues are of such vital concern that they should be included briefly, both in this report and in the committee's recommendations. For most of the documentation summarized here, the advisory committee is indebted to the State Bar Committee on Women in the Law for its pioneering survey of women lawyers and the practice of law.¹⁴⁰

• Statistical Profile

In August 1987, the ABA adopted Goal IX as part of its national agenda. Goal IX targeted "full and equal participation in the profession for minorities and women" as an urgent objective of the association. In furtherance of Goal IX, the ABA established the Commission on Women in the Profession, which held extensive public hearings on the status of women in the profession in 1988. Shortly thereafter, Chief Judge Patricia M. Wald of the United States Court of Appeals for the D.C. Circuit confronted the ABA Annual Meeting with discouraging data:

Beneath some heartening statistics (40 percent of law students and 20 percent of practitioners are women) lurk signs of trouble. Only 8 percent of the partners in the 250 largest law firms in the country are women; only 6 percent of law-school deans and 10 percent of tenured law-school teachers are women. In the four years from 1976–80, 41 women were appointed to the federal bench; in the next *eight* years, only 31 were appointed.

More alarming indicators: the median income of women 10 years out of law school runs 40 percent lower than men's. Far more men than women

¹³⁹ Rhode, *Perspectives on Professional Women* (1988) 40 Stan.L.Rev. 1163–64.

¹⁴⁰ Laidlaw and Kipnis, Associates, Survey, *Women Lawyers and the Practice of Law in California*, conducted for the Committee on Women in the Law, State Bar of California, in cooperation with the Employment Law Center/Legal Aid Society of San Francisco (1989), on file at the AOC. [hereinafter "Women in the Law Survey"].

in law firms are partners; far more men practitioners are married and have children.

In one mid-eighties survey of lawyers, twice as many women as men expressed dissatisfaction with their work environment. Yet women lawyers come from the same social backgrounds as men, go to the same law schools, earn the same grades, and serve on the same law reviews. What happens later?¹⁴¹

California surveys conducted by local women's bars corroborate the bleak picture presented by Judge Wald. Although California statistics appear to exceed the national average, the discrepancy between the number of women associates and the number of women partners in major law firms is still vast. In May 1989, for example, Queen's Bench, a San Francisco women's bar association, found that whereas 42 percent of the associates in the firms surveyed were women, *only 12 percent of the partners were women*.¹⁴² Women Lawyers Association of Los Angeles announced survey results indicating that *only 8.1 percent of partners in the major law firms it surveyed were women*, while 30.6 percent of the associates were women.¹⁴³ Of the women surveyed by the Committee on Women in the Law, 40 percent were associates and *only 13 percent were partners*.¹⁴⁴ Whether the figure is 8 or 12 or 13 percent, women are unquestionably underrepresented in the partnership ranks of major California law firms.

Significantly, many women lawyers in California do not practice in large firms—especially in rural settings. In March 1988, Fresno County Women Lawyers conducted a survey of women lawyers in that county. The survey revealed that *only 1 woman* among the 168 attorneys in the largest law firms in Fresno, defined as those with more than 15 attorneys, was a partner in her firm. Moreover, that one woman only became a partner during the year preceding the survey.

Traditionally, government positions have been more open to women and minorities. The Fresno survey revealed that in the three largest public sector employers—the offices of the district attorney, public defender, and county counsel—there were no women with the title of assistant and only one female chief deputy. The latter had been appointed within the preceding year.¹⁴⁵ Janice Kaminer-Reznik explained in her testimony at the Sacramento public hearing that in small towns women are apt to

¹⁴¹ Wald, *Women in the Law: Despite Progress, Much Still Needs to be Done* (1988) 24 Trial 75 (adapted from Judge Wald's presentation at the ABA Annual Meeting in Toronto, August 1988).

¹⁴² San Francisco Recorder (May 22, 1989), pp. 1, 14. The percentage of partners marked a 3 percent increase over the percentage recorded in a similar survey conducted three years earlier.

¹⁴³ Los Angeles Lawyer (November 1986), p. 10.

¹⁴⁴ Women in the Law Survey, *supra*, p. 1.

¹⁴⁵ Fresno public hearing transcript, pp. 17–18.

be sole practitioners or in partnerships with other women, and their numbers are not reflected in surveys of the larger firms.¹⁴⁶

- **Employment Concerns of Women Lawyers**

The information reviewed by the advisory committee demonstrated that while women compose a substantial number of practicing lawyers and that while their numbers are increasing in positions of leadership, the discrepancy between the number with leadership roles and the number with subordinate roles is great. The progress of change in this regard is too slow. Moreover, the committee found that women lawyers have a series of growing concerns that may contribute to their inability to achieve full and equal participation in the profession.

The identified concerns included the following: (1) opportunities for advancement and promotion appear less available to women than to men. More specifically, women are concerned about achieving equal earnings, acquiring new business, influencing decision-making in firm governance and management, having equal access to mentors, and avoiding stereotypic employment roles; (2) difficulties in balancing home and family directly influence the status of women in the profession. Women are concerned about forced entry into "mommy track" rather than partnership-track positions, the lack of adequate parental leave and flex-time opportunities, and the need for adequate child care; and (3) sexual harassment of women in the legal workplace exists. Women attorneys are concerned about eliminating such unlawful conduct.

These employment issues surfaced in two separate surveys conducted by the Women in the Law Committee, first of women who practiced in small firms and later of California women lawyers generally. According to these surveys, 96 percent of California women surveyed believed that they experienced more difficulty than men in balancing home and family, 62 percent believed that they had fewer opportunities for advancement than did men, 31 percent said that having children had a negative effect on their employment situation, and 89 percent said that their employer did not provide any child care benefits, in the form of either funding or on-site child care facilities.

Sexual harassment also proved to be a significant issue for those who responded to the surveys. Eleven percent said that they had experienced some form of sexual harassment at their present jobs, 25 percent said that sexual harassment had occurred at a previous job, and 25 percent said they believed sexual harassment existed in the legal profession in general.¹⁴⁷

¹⁴⁶ Sacramento public hearing transcript, p. 23.

¹⁴⁷ Women in the Law Survey, *supra*.

These concerns were voiced at the public hearings conducted by the advisory committee as well. Expert Patricia Phillips remarked:

Women lawyers have become, in fact, the drones of the legal profession. Women lawyers are generally saddled with the lowest paying cases, and they are practicing in the least effective, least glamorous, if you will, fields of practice. I am told that between 45 to 50 percent of the graduating classes these days constitute women.

Yet the percentage of women who become partners in firms of any size today, not just major law firms, is disproportionately small. Indeed, most women lawyers are either in sole practice, or very small firms, sometimes all women firms, or have opted for less remunerative types of practice.

An alarming number of those who do enter the practice as associates in law firms often find themselves so stressed out between the demand of the practice, and the demands of family life, that they opt out altogether, or they opt for the new second-class citizen track, the mommy track.¹⁴⁸

One woman eloquently described her heroic effort to match the time commitment and abilities of her male colleagues at a time when her child was seriously ill. Nonetheless, her firm, in her view, forced her to quit. She explained:

The final straw for me came when I was informed in substance that there were no complaints about the number of hours I billed for the firm, but the firm objected to me spending time away from the office and performing duties away from the office when my daughter, who has a severe health problem, was hospitalized or ill. In substance, my long days and my long nights were not enough. I was offered a choice, neglect my daughter's needs or leave the firm. I chose the latter. The men who offered me this choice pride themselves on the sacrifices their families have made in order for them to practice high-quality law.¹⁴⁹

There is considerable evidence that law firms are ill-served by the drain of highly priced, highly trained associates who seek to have families as well as legal careers. Indeed, Louise LaMothe has argued forcefully that accommodation of women lawyers during child-bearing years makes good economic sense. She stated:

The firms that will succeed in our increasingly competitive profession are those with policies that further the concern of lawyers—50 percent of them women—who are coming along. Successful firms will not simply use a talented young associate for three or four years and drive her out. Instead, the firms will take a long-term approach to careers, recognizing that accommodation during the five-to-ten years of young parenthood

¹⁴⁸ Los Angeles public hearing transcript, p. 46.

¹⁴⁹ Letter dated March 23, 1988, Fresno County, on file at the AOC.

help[s] protect the firm's investment in the career of a well-trained attorney. That will be smart management.¹⁵⁰

Eleven percent of the attorneys surveyed by the Committee on Women in the Law reported that they had experienced some form of sexual harassment in their present job. Nonetheless, with one exception, sexual harassment within law firms was not addressed at either the regional meetings or the public hearings. The witness who did touch on the subject related an anecdote about the snide remarks and innuendos made when she traveled with one of the senior partners on business. Despite the fact that no sexual relationship had transpired, she was informed by the firm that it would be better if she were married, and ultimately she was asked to leave the firm because she "did not fit in." She contended that her firm admitted that her work was superior and that her clients enthusiastically praised her. From this woman's perspective, the appearance to some of sexual impropriety resulted in her departure from the firm.¹⁵¹

A possible explanation for the dearth of testimony on sexual harassment received by the committee may be the fear that women attorneys feel about disclosing incidents of sexual harassment. As a recent ABA publication concluded, "The bottom line on sexual harassment in law firms? Don't assume that the absence of complaints means it isn't a problem. It could just mean that women lawyers—even the best educated and most forceful—are afraid to complain."¹⁵²

- **Recommendations**

Based on the documentation provided by the Committee on Women in the Law and testimony submitted to the advisory committee, the committee recommended that the State Bar adopt a rule of professional responsibility that would prohibit sex discrimination, including sexual harassment, in legal employment.

Gender issues have too long been considered the exclusive province of women. Committees such as the Committee on Women in the Law and women's bar organizations have exclusively shouldered the burden to produce change in the legal profession. While the contribution of these organizations has been extraordinary, it is not enough. Change will continue to be slow and inadequate until the profession recognizes that the issue of fairness in legal employment is an issue that concerns all lawyers, male and female, that improving conditions for women in the practice of law benefits all lawyers, and that the profession's public reputation, so sadly tarnished, will be enhanced when full participation for all members of the bar is guaranteed. Only then will solutions to the problems faced by women lawyers be possible. For these reasons, the advisory

¹⁵⁰ LaMothe, *Stopping the Female Brain Drain* (Sept. 6, 1989) San Francisco Recorder 6–7.

¹⁵¹ Fresno regional meeting summary, pp. 15–16.

¹⁵² Burleigh and Goldberg, *Breaking the Silence: Sexual Harassment in Law Firms* (1989) 75B ABA Journal 46, 52.

committee recommended that all of the proposals made by the Women in the Law Committee in its recent survey be made a priority of the full bar, including all appropriate sections and committees.

5. MEMBERSHIP IN DISCRIMINATORY CLUBS

RECOMMENDATION 10

Request the Judicial Council to transmit and urge consideration by the State Bar of California of the advisory committee's recommendation that the State Bar use every available means permitted by the Constitution to discourage attorneys from using for business purposes clubs that practice invidious discrimination.

The advisory committee recognized that the debate about attorney membership in discriminatory clubs has bitterly divided the profession. On one side are those who seek to end the serious limitations that have heretofore prevented women and minorities from full participation in the profession; on the other side are those who emphasize a cherished right of privacy and freedom of assembly. It was not the committee's purpose to resolve that debate or to address the constitutional issues of great complexity that it raises.

The advisory committee concluded, however, that continued membership in and use for business purposes of discriminatory clubs by members of the legal profession have a significant, deleterious effect on the ability of men and women who are excluded from membership to achieve equality in the profession. The significance of this issue will continue to increase as more women and minorities enter the profession. The committee found it difficult to reconcile the use of club premises for business purposes with a professed lack of bias or prejudice. To the contrary, the committee found that exclusion from membership in these clubs has the following negative and undesirable effects: (1) fostering a stereotype of inferiority for members of the affected class of attorneys; (2) depriving affected attorneys of access to important business or political meetings; (3) conveying an impression of a lack of impartiality on the part of the bar to the public and to present and future clients; (4) depriving affected attorneys of business and political influence and the right to make important business and professional contacts in a congenial setting; (5) depriving affected attorneys of a source of support in seeking elected or appointed office; and (6) depriving affected attorneys of a source of community involvement. These negative effects were recognized by women attorneys in both the survey of small firms and the later survey of all women lawyers conducted by the State Bar Committee on Women in the Law.¹⁵³

¹⁵³ Women in the Law Survey, *supra*.

The issue of membership in discriminatory clubs has received compelling attention statewide and nationally. Efforts to eradicate discriminatory practices by clubs have included the adoption of local ordinances, the attempted elimination of tax deductions for business expenses incurred at discriminatory clubs, the attempted revocation of liquor licenses of discriminatory clubs, and the 1988 adoption of an ABA resolution finding discrimination by private clubs unfair.

Accordingly, the advisory committee concurred in State Bar efforts to urge law firms not to pay club dues or reimburse club expenses, to refuse to use club premises for firm functions, to work to reform club policies, and to urge firm members to voluntarily resign from discriminatory clubs.¹⁵⁴ Further, the committee supported the State Bar Conference of Delegates resolution that would prohibit members of the Board of Governors from belonging to discriminatory clubs, provided the measure would pass constitutional muster. In any event, any attorney standing for election to the Board of Governors should be required at a minimum, to disclose membership in a discriminatory club.

V. CONCLUSION: JUDICIAL APPOINTMENTS

The evidence received by the advisory committee in the areas of litigation and courtroom interaction collectively pointed to one, inescapable conclusion: substantial amelioration of the problem of gender-biased conduct in the courtroom would be accomplished if more women were appointed to the bench. Women should attain judicial office in numbers commensurate with their numbers in the legal profession and in society as a whole.

This conclusion has not resulted in an advisory committee recommendation because the Judicial Council, and appropriately so, has no control over the appointment process. Further, the committee acknowledged and applauded ongoing gubernatorial efforts to appoint qualified women to the bench. The issue, however, is of such paramount importance that the committee decided to include in this report information supporting reform of the appointment process to accomplish greater diversity in judicial appointments.

¹⁵⁴ Board of Governors Resolution, adopted Aug. 23, 1986, authorizing publication of a letter on discriminatory clubs in Cal.Law., on file at the AOC.

A. THE CASE FOR DIVERSITY ON THE BENCH

Statistics on the appointment of women to the bench fluctuate constantly and differ depending on their sources. In California, those figures have ranged from 11 percent to 16 percent. As of 1990, 196 out of 1,481 filled judicial positions and 1,555 authorized positions were held by women.¹⁵⁵ This figure represents approximately 13 percent of the appointed and elected state court judges in California. In contrast, at least 24 percent of California lawyers were women.¹⁵⁶ At the same time, women have been entering the profession in much larger numbers and represent at least 50 percent of the state's population. Although California surpasses the national average, reported as 7.4 percent of federal judges and 7.2 percent of state court judges,¹⁵⁷ the percentage of women judges here does not come close to their percentage in the profession or in society.¹⁵⁸

Witnesses who submitted testimony to the advisory committee supported gender diversity on the bench as a means to end gender bias in our courts. This testimony came from a wide range of individuals performing various roles in our court system, including presiding judges, distinguished civil litigators, presidents of bar associations, family lawyers, and attorneys practicing in rural areas.

Justice Daniel M. Hanlon, then presiding judge of the San Francisco Superior Court, attributed the success of that court in ensuring gender fairness in the courtroom to the presence of women judges: "With these women in leadership positions in our courts in this county, we find that from their courts, we find a professional consideration of lawyers who happen to be women, a fair treatment of litigants who happen to be women, and the dignified relationship with attaches and employees of the court who also happen to be women."¹⁵⁹

Practicing women attorneys in various jurisdictions forcefully called for the appointment of more women to the bench. Jasnie Kaminer-Reznik deemed diversification on the bench "the only way to ensure that there will be a compassionate, fair judicial system for everybody."¹⁶⁰ An anecdote from the Sacramento public hearing

¹⁵⁵ *Ibid.*

¹⁵⁶ Allen, *Special Report: The Deukmejian Judiciary* (1988) 8 Cal.Law. 33 (citing the 1980 census, bar exam pass rates from 1981 to 1987, the San Francisco Examiner, and the press office of Gov. George Deukmejian).

¹⁵⁷ Sacramento public hearing transcript, p. 128.

¹⁵⁸ Other appointed government offices also lack diversity. One study, for example, examined appointments to state boards and commissions made by the Governor, the Senate Rules Committee, and the Assembly Speaker. In these appointments women did not reach parity with men in any of the categories considered. They tended to approach parity only in areas traditionally associated with female interests, such as health and social service boards. "California Women Get on Board!" a study of the Senate Rules Committee, reported in Sacramento Daily Recorder (Aug. 24, 1989) *Women Lack Representation within State*, p. 5.

¹⁵⁹ San Francisco public hearing transcript, p. 11.

¹⁶⁰ Sacramento public hearing transcript, p. 27.

further illustrated this point. The panel of advisory committee members present at that hearing contained a majority of women. One witness looked up as she began her testimony, appeared to gasp slightly, and, somewhat humorously, told the committee that she fervently hoped no mishap would occur in the building that day to imperil these women judges, as the women litigators in the state could ill afford to lose so great a percentage of them.¹⁶¹

One litigator linked what she described as affirmative action in the appointment process to improving gender fairness in the courtroom:

But overall, it makes a huge and positive difference when women, people of color, and others who are cousins in this world of prejudice, are placed in positions of authority in our system, and when those individuals proudly represent themselves on the bench, while not letting their identity interfere, allowing their identity to be seen.

And I think in that regard, that I have to say that there's one element of all this inquiry into gender bias that leads me to the conclusion that you can't do much without the direct and vigorous application of affirmative action principles.

Women educate men for the most part about gender bias. Men then educate other men, but women start it. And when women educate men on the bench, some very magical differences get named. So along with all the things that this committee can recommend, it seems to me that keeping up the process of making sure that qualified women and minorities make their way into positions of authority is at the heart of making hearings like this one unnecessary in the next century.¹⁶²

Honey Kessler Amado, co-chair of the Judicial Appointments Committee for California Women Lawyers, added:

Our goal is that it should go without saying, rather than still bear repeating, that *the bench in California must reflect the diversity and richness of California's social landscape*. Each person sees the world through his or her own eyes, and how and what we see is inescapably colored by our own personal experiences.

Thus, without implying that one cannot be sensitized through many of the programs that have been discussed this morning, it is true that one who experiences prejudice sees it and understands its pain and debilitations more readily than those who have never experienced prejudice.

¹⁶¹ *Id.*, pp. 156–57.

¹⁶² San Francisco public hearing transcript, pp. 53–54.

Those who experience prejudice are less likely to dismiss prejudice as just a joke, or call on the victim to toughen up. In addition, women have different experiences in socialization and bring these different kinds of insights into their positions of responsibility and authority.

*A bench reflecting California's varied makeup will go a long way toward eradicating gender bias in the courtroom.*¹⁶³ (Emphasis added.)

Judicial scholars confirm the need for diversity in judicial appointments. In an article in *Judicature*, an esteemed publication on court administration, political scientist Elaine Martin reported her findings from a survey of federal judges appointed by former President Jimmy Carter. In the analysis of her findings, she found that attitudes differed dramatically between male and female judges on such issues as the degree of conflict between professional and family roles, marital conflicts, differing parental and household roles, interest and support for women achieving political office, and perception of discrimination as an obstacle for women professionals. Although she was careful to qualify her findings as limited to judges appointed by a single president, Professor Martin concluded that the gender-based difference she detected

might influence . . . decisional output, especially in cases involving sex discrimination; conduct of courtroom business, especially as regards sexist behavior by litigators; influence on sex-role attitudes held by their male colleagues, especially on appellate courts where decisions are collegial; administrative behavior, for example in hiring women law clerks; and . . . collective actions, through formal organizations, undertaken to heighten the judicial system's response to gender bias problems in both law and process.¹⁶⁴

Northwestern University School of Law Professor Anthony D'Amato concurs. In his view, "we need representative minds on the bench. If society makes some minds different from others—because of the way society treats persons based on characteristics such as race or gender—then the bench should reflect those different perspectives."¹⁶⁵

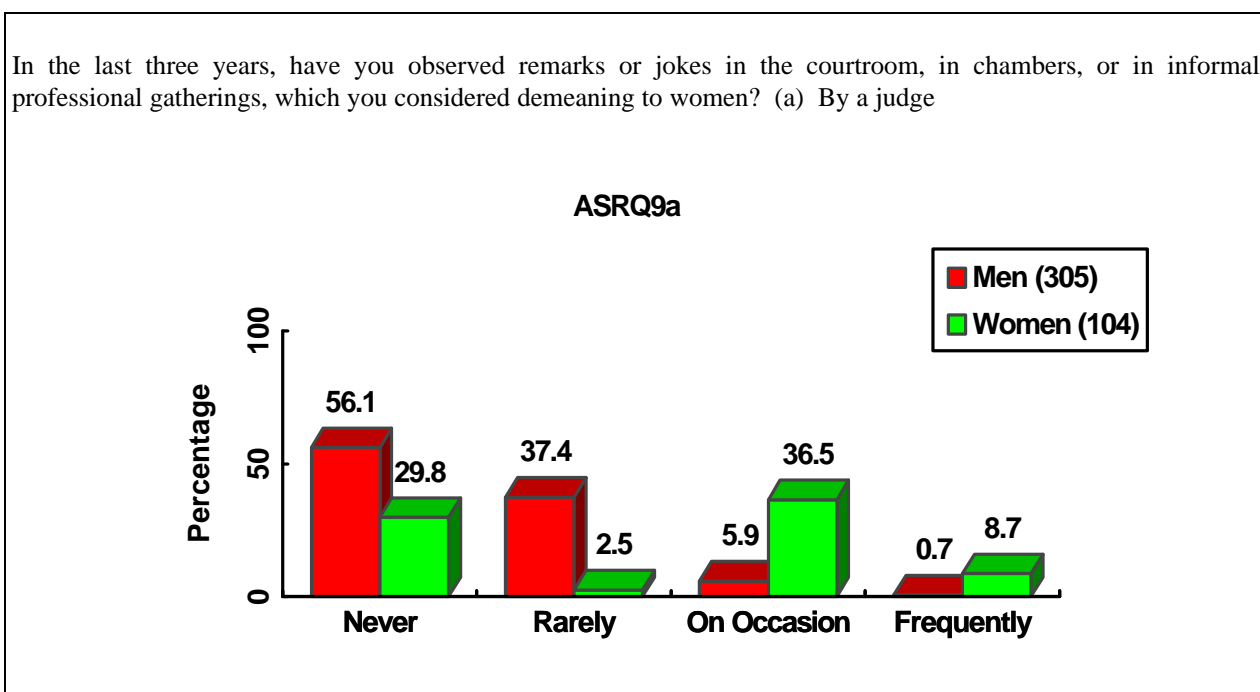
Perhaps the strongest case for gender diversity in judicial appointments comes from the responses submitted by the judges who completed the California Judges' Survey. The survey fully corroborated the view that women bring different attitudes and perceptions to the bench, that these different perceptions may influence case outcome, and that therefore society is entitled to the benefits of those different perceptions. The responses of male and female judges differed dramatically, both for questions relating to the perception of gender bias in the courts and questions relating to substantive decision-making.

¹⁶³ Fresno public hearing transcript, p. 95.

¹⁶⁴ Martin, *Men and Women on the Bench: Vive La Difference?* (1990) 73 *Judicature* 204, 208.

¹⁶⁵ D'Amato, *More Women on the Bench?* (Apr. 6, 1989) *Los Angeles Daily Journal* 6.

For example, a dramatic gender difference emerged when judicial officers were asked if they had observed remarks *by judges* that they consider demeaning to women. A statistically significant and very large gender difference characterized answers to this question—roughly 45 percent of female judges said they had observed such remarks "on occasion" or "frequently," while the corresponding figure for male judges was less than 7 percent.¹⁶⁶ A graphic depiction of this gender difference follows.

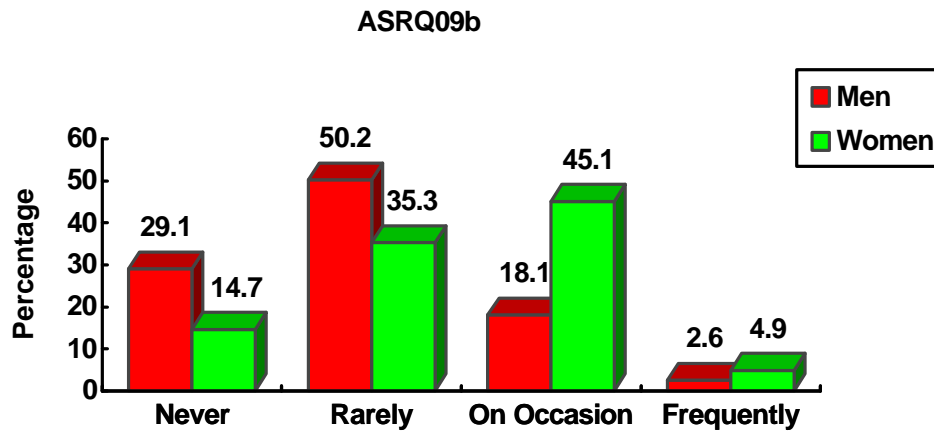


A similar difference appeared when judicial officers were asked whether they had observed *lawyers* make remarks demeaning to women. Roughly 50 percent of female judges reported observing such remarks by lawyers "on occasion" or "frequently," while a much smaller proportion, roughly 21 percent, of male judges reported observing such remarks.¹⁶⁷ This difference between female and male judges is summarized visually below.

¹⁶⁶ Judges' Survey, question 9a.

¹⁶⁷ *Id.*, question 9b.

In the last three years, have you observed remarks or jokes in the courtroom, in chambers, or in informal professional gatherings, which you considered demeaning to women? (b) By a lawyer



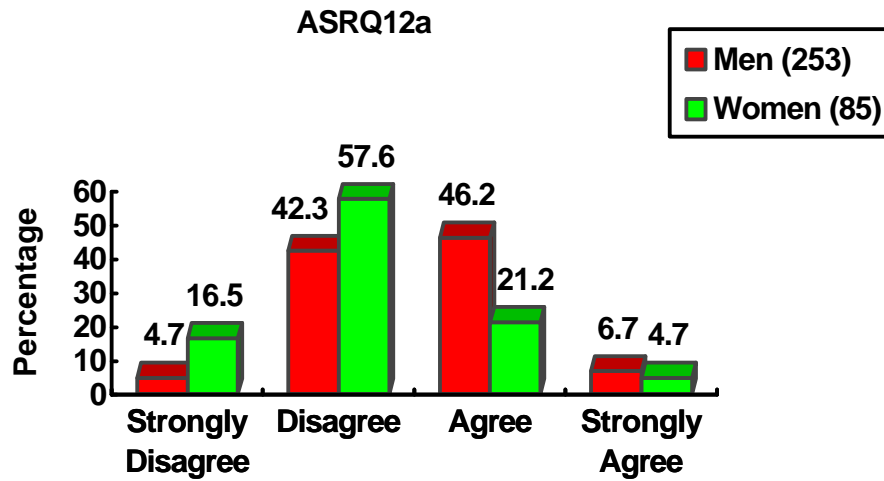
Female and male judges also disagreed in their perceptions of issues that clearly affect the outcomes of specific cases. For example, judges were asked if they believed that allegations, declarations, and testimony about domestic violence are often exaggerated. Roughly 75 percent of female judges disagreed or strongly disagreed; that is, they rejected the view that such testimony and allegations are often exaggerated. The corresponding figure for male judges was 47 percent.¹⁶⁸

This difference extended as well to the disposition of domestic violence criminal matters. Judges were asked their views of the following statement: "Domestic violence offenses are better dealt with in the context of diversion and counseling than in a criminal prosecution." Roughly 22 percent of female judges agreed or agreed strongly with this statement; the remainder disagreed or strongly disagreed. Roughly twice as many, 40 percent, of male judges agreed or agreed strongly with this statement, while the remainder disagreed or strongly disagreed.¹⁶⁹ Graphic depictions of these responses follow.

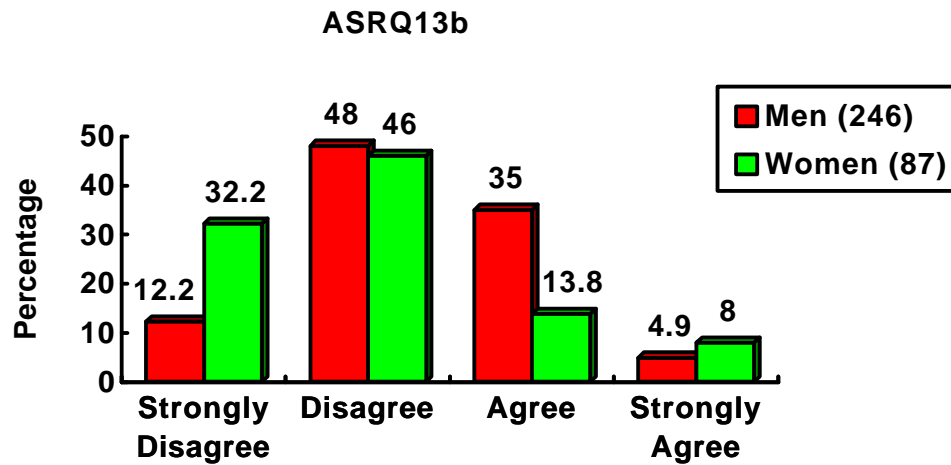
¹⁶⁸ *Id.*, question 12a.

¹⁶⁹ *Id.*, question 13b.

In a proceeding involving allegations of domestic violence, supporting declarations and testimony is often exaggerated.



Domestic violence offenses are better dealt with in the context of diversion and counseling than in a criminal prosecution.



B. RURAL COURTS: A CASE STUDY

Nowhere was the need for gender diversity in judicial appointments felt as strongly as in the rural counties, where only two women held the office of superior court judge when this report was issued in draft form. One of those judges, Butte Superior Court Judge Ann H. Rutherford, testified at the Sacramento public hearing. Over Judge Rutherford's 13-year tenure on the bench, the appointment picture in the rural courts of Northern California had not changed much. She described the situation as follows:

But to give you a little concept, I've been on the bench 13 years, and when I started, if we took a line from the Golden Gate Bridge to the north border of Sacramento County and went to the north third of the state, and that is a third of the state territory, I think I was the only woman (judge) in that territory.

Since that time, we've acquired a justice court judge in Lake County. We had a justice court judge at Grass Valley before her demise. We've acquired two municipal court judges in Yolo. We've acquired judges in Sonoma and Marin, and I think that is it. That's the progress we've made.¹⁷⁰

In Fresno, a fast-growing but essentially rural farming community, the struggle to acquire a woman on the superior court has been bitter. Women lawyers in Fresno consider discrimination in some of the major law firms that serve as a primary source of judicial appointments as an underlying cause of the dearth of women judges. At the Fresno regional meeting, distressing law firm practices were reported. Women spoke about their exclusion from client contact, court appearances, social events, and firm lunches, their relegation to "bottom of-the-barrel" legal tasks, their unequal access to clerical support, and the outright refusal by some firms to recognize that qualified women deserved employment.¹⁷¹

In a letter to the editor of *The Fresno Bee*, a local gender bias committee stressed the benefits of including women on the bench:

Women judges, it has been shown, educate their colleagues: They form part of a group of peers that exercises strong influence on its members. Thus, through instruction, education, and a healthy dose of peer pressure, women jurists eventually mitigate the effects that long years of acculturation and training have had on their brethren.

¹⁷⁰ Sacramento public hearing transcript, p. 275.

¹⁷¹ Fresno regional meeting summary, pp. 14–16.

We must be very clear that we do not consider to be evil-spirited or bad those judges who evidence gender bias: They are products of our culture, and most have not had an opportunity to see how our culture blinds and biases us.

In addition, many men who sit on Fresno County courts are products of the three or four largest law firms in town, or of the District Attorney's Office, where women have not until recently been hired as attorneys at all. The role of women in these firms traditionally has been that of support staff: secretaries, paralegals, go-fers. The men in such firms thus have had no opportunity to deal regularly with women as peers: The women in their daily experiences are handmaidens, not powerful allies or adversaries.

We advocate the appointment and election of a substantial number of qualified women to our courts at every level. We believe that women's life experience and perspective are important in the substantive decision-making that forms the daily bread of a judge's existence, and, as important, that *the presence of women on the bench makes unavoidable the enrichment of perspective necessary for the entire judiciary to do its job right.*¹⁷² (Emphasis added.)

C. RECOMMENDATIONS

Embarking on the program described in this chapter would mark the commencement of the critical work of ensuring equality for women in civil litigation. Change is urgently needed if California's courts are to offer not only justice, but also the appearance of justice. In summary, the committee asked the Judicial Council to:

- Urge establishment of a clear ethical duty for judges to refrain from and prevent gender bias in the courtroom.
- Urge extension of that same ethical duty to others acting in judicial capacities.
- Distribute a manual on fairness for use by those who work in our courts, including both judges and court employees.
- Create an informal mechanism for addressing complaints about gender-biased conduct, one that may be invoked without resorting to judicial disciplinary procedures.
- Urge imposition of a clearer mandate prohibiting judges from belonging to clubs that practice invidious discrimination.
- Urge establishment of an ethical duty, duly tested on the bar examination, for lawyers to refrain from exhibiting gender bias that exceeds the bounds of legitimate advocacy, and urge creation of a comprehensive education program for lawyers on issues of gender bias.

¹⁷² Milrod et al., *Why More Women Judges Are Needed* (May 1, 1989) Letter to the Editor, The Fresno Bee.

- Mandate the use of gender-neutral language in all court communications, including jury instructions.
- Establish a model policy for the appointment of counsel that ensures equal opportunity in the appointment process.
- Urge the imposition of an ethical duty for lawyers to refrain from discrimination on the basis of sex in employment and to refrain from sexual harassment in the legal workplace.
- Urge that the State Bar take all necessary steps consistent with the Constitution to combat the pernicious effects of the use of discriminatory clubs for business purposes in the legal profession.
- Encourage the appointment of judges who will ensure diversity of sex and race in the California courts.

Chapter Five

Family Law

I. INTRODUCTION

Family law matters are breeding grounds for bias. How many judges have preconceived notions about why airplanes crash? How many judges are convinced that certain automobiles are defective? These personal injury cases do not usually call out the inherent and deeply held personal views judges have about life and relationships between people.

Ask instead, however, how many judges have views about the way to raise children, the proper role of women in our society, whether children of a young age are better off with their mothers or their fathers if a choice needs to be made, or whether after divorce women should be entitled to money earned by men, and you may reach a different result. Each of us has been raised in a family and many of us have gone on to create our own families. Thus, our views about the way families should function are forged out of our own experiences.

Information received at the hearings and regional bar meetings reflected concern about the impartiality of judges who, as a result of divorce, were paying spousal support¹ or had lost custody of their children². The Judges' Survey confirms that at the time the data was compiled a large number of judges had themselves experienced a divorce. The survey describes the marital status of the respondents in the chart on the next page.

¹ Orange County, p. 103, in regional meeting summary, p. 5.

² Written comment, dated Apr. 27, 1987.

STATUS	PERCENTAGE
Single	4.5
Divorced	9.7
Widowed	1.2
Married (and previously divorced)	22.8
Married (and never previously divorced) ³	61.8

Thus, 32.5 percent of the judges who answered the survey have experienced divorce and bring the memories of that experience with them to the bench. And, of course, this number would be even greater if the survey had asked whether the judges' parents had been divorced or whether a close sibling had experienced divorce.

In this context, we ask family law judges every day to put aside their deeply held personal views. We ask them to do so even though they are not necessarily educated in the field of family law. They may have no information about the economics of divorce, the sociological ramifications of their decisions, or the psychological effects of divorce on children. They may also have little time in which to make their decisions and limited staff resources to assist them. We ask all of this in a field with vast discretion and limited appellate review—one that touches the lives of more people than any other category of civil litigation.

The advisory committee found that bias is a serious problem in family law. In part, the reason appears to be that the system has so little valued families that judges are effectively deprived of the experience, the knowledge, the time, and the resources necessary to ensure fairness in family law proceedings. This devaluation has had a sharper and more serious effect on the impecunious spouse, who is usually the woman, and on the children.

II. CHAPTER OVERVIEW

In 1988–89, 171,120 petitions for dissolution of marriage were filed in California—more filings than in any other category of civil litigation for which statistics were available. Of these filings, 9,855 (5.8 percent) were resolved after a trial of contested issues.⁴

³ Judges' Survey

⁴ See Judicial Council of California, *Annual Data Reference*, 1989, p. 13.

The issues involved in a dissolution of marriage are of primary significance to the litigants. At stake may be substantial amounts of money, the family home or business, the health and safety of the children, and the future financial security of the family. The resolution of these issues in a dissolution of marriage has a disparate impact on women for three reasons:

- Despite significant and continuing changes in the social structure of California, at the time this report was originally submitted to the Judicial Council, women were still overwhelmingly the primary caretakers of children.⁵
- While advances had been made, the wage rates for women still fell well below those for men.⁶
- The discretionary nature of most family law decisions, and the difficulty, expense, and delay of appealing those decisions, result in biases based on gender stereotypes and misconceptions that are incorporated into family law decision-making.

Consequently, issues of family law are of primary importance to the study of gender fairness in the courts of this state. The Judicial Council Advisory Committee on Gender Bias in the Courts ("advisory committee") found that gender bias affects the resolution of family law cases in both overt and subtle ways. This section will discuss the role of bias in the following areas:

1. The laws applicable to family law proceedings and the ways in which judges interpret and enforce them;
2. Impediments to the neutral participation in family law proceedings by judges, lawyers, and mediators;
3. The interaction of the different components of the family law system to create delay, inappropriate allocation of court resources, and issuance of conflicting and overlapping orders that affect families;
4. Other barriers to full and fair access to the courts for family law litigants; and
5. The lack of information and research vital to the impartial resolution of family law cases, and the need for augmented training and education of judges.

⁵ Senate Task Force on Family Equity: Final Report (June 1987) [hereinafter "Senate Task Force Report"], pp. I-2 – I-4; I-9.

⁶ *Ibid.*

III. METHODOLOGY

The most significant sources of information on the subject of gender bias in family law included (1) testimony from expert witnesses invited to participate in the public hearings and from members of the public; (2) the Judges' Survey; and (3) an extensive literature search. The public hearings were particularly valuable because experts among judges, mediators, certified family law specialists, and psychologists currently conducting research in the fields of concern to the committee were invited to testify. They often prepared their remarks in advance and submitted a written copy to the committee members. Further, the public hearings provided a forum for members of the public to air their grievances about the family law system. While the accuracy of the anecdotes related could not be checked, the witnesses expressed themselves with sincerity and respect, and demonstrated the public's perception of the family law court system.

The Judges' Survey contained an extensive section on family law, and provided the committee with the best information available on judicial practices and attitudes in this area. Questions were designed to elicit information about mediation, custody, spousal abuse, access to the courts, and child and spousal support. Judges were also asked to reflect on their assignment preferences and whether they believed that judicial resources were adequate in the field of family law.

Scholarly and professional journals abound with articles on family law. The committee reviewed as many articles as practicable and found the literature a good source of analytical criticism of the system.

The Family Law Subcommittee also benefited greatly from the views expressed at the family law focus group conducted at the State Bar Annual Meeting in September 1988. There, the subcommittee members were able to discuss the allocation of judicial resources in family law with attorneys of long-standing eminence in the profession. Specific questions to guide the discussion were distributed in advance, with an emphasis on possible remedies for perceived problems. Family law also was an important topic at the regional bar meetings, which provided the committee with its first sense of the problems areas in family law. Finally, a survey of practices in awarding attorney's fees was conducted by affiliates of California Women Lawyers and yielded information about these practices in 22 counties.

IV. FINDINGS, RECOMMENDATIONS, DISCUSSION, AND ANALYSIS

A. THE APPLICABLE LAWS, THEIR INTERPRETATION, AND THEIR ENFORCEMENT

1. CHILD SUPPORT

FINDINGS

The advisory committee discerned three serious problems for women and children in the way child support awards are made. They are listed below:

- **Awards Are Too Low**

The committee found that child support awards in California are too low to provide children with an adequate standard of living. Federal efforts to ensure higher and more collectible child support awards have resulted in an increase in the aggregate dollar amount of the awards.⁷ Awards are nevertheless too low, especially in individual cases, because the formulas and guidelines are not always realistically calculated or applied. The guidelines are based on figures used to calculate the cost of maintaining *one intact household*, not the two households created by divorce. Moreover, in California, guidelines are also linked to the amount of time the custodial and noncustodial parent agree to spend with the children of the marriage. But in practice, the noncustodial parent may not spend the anticipated amount of time with the child. Finally, while the advent of child support guidelines and formulas for minimum child support awards may have saved judicial and court time, judges may rely too heavily on formulaic approaches. Although the law permits deviation from the guideline where appropriate, some judges tend to use these levels as a ceiling—not a floor.

Another concern is the short duration of child support, which ends at age 18. Children who would ordinarily be supported while they pursue higher education are abruptly left to rely on the custodial parent's income or their own savings and earnings at a time when the expense of higher education is skyrocketing.

- **Awards Are Used as Custody Bargaining Chips**

Historically, child support awards have been linked by statute to custody arrangements.⁸ This linkage has led to noncustodial parents calculating the number of

⁷ Tjaden, Thoennes, and Pearson, *Will These Children Be Supported Adequately? The Impact of Current Guidelines* (Fall 1989) *Judges' Journal* 5–9, 36–42.

⁸ Civ. Code, § 4727, added by Stats. 1984, ch. 1605, § 4, amended by Stats. 1990, ch. 1493 (Assem. Bill No. 3974), § 3, repealed by its own terms, March 1, 1991.

days they must spend with their children to secure lower child-support awards. Sometimes with no intention of carrying out the agreed-upon visitation or custody plan, a parent has used the threat of a custody battle to force the custodial parent to accept an unfair support award. In other instances, support awards are suspect because they are predicated on an unrealistic custody plan.

The new Family Code, enacted in 1992 and effective January 1, 1994, omits previous statutory provisions allowing the percentage of time a noncustodial parent spends with the children to reduce that parent's support order.⁹ It is too soon to tell what effect, if any, this omission will have upon prior practice.¹⁰

- **Awards Are Too Often Not Collected**

Child support awards, even if properly and fairly calculated, are often not enforced—even when the payer has the funds. Although procedures for collection are available, it is time-consuming, expensive, and complicated to enforce child support awards. Legal assistance in collecting and modifying support is theoretically available from district attorneys' offices and private counsel, but many receive no assistance, both because district attorneys' offices are inadequately funded and because many families are financially unable to retain an attorney.

Failure to pay child support is perhaps the most flagrant and routine example of disobedience to a court order. It should not be tolerated. Yet, some courts appear indifferent to the failure to pay child support. Such indifference is demonstrated by denying contempt, refusing to order jail time for repeated contempts, and ordering small installment payments, even when the arrearages are great and the history of failure to pay is long.

⁹ See *supra*, note 7; see Fam. Code, § 4053 (eff. Jan. 1, 1994). The Family Code consolidates family law-related statutes from the Civil Code, Code of Civil Procedure, Evidence Code and Probate Code into a unified framework for family law. According to the tables preceding the code, former Civ. Code, § 4727, is omitted from the new code. Moreover, Fam. Code, § 4053, setting forth the formula for the statewide uniform child-support guideline, contains no reference to the so-called "H" factor. Under former Civ. Code, § 4731, which new Fam. Code, § 4053 will supersede, a child-support award was reduced by "H%" which was the "approximate percentage of time that high earner has or will have primary physical responsibility for the children compared to the other parent" (Civ. Code, § 4721(D)). This seemingly significant omission is odd in light of the Law Revision Commission's legislative charge to reorganize the major family law statutes and to resolve technical and procedural inconsistencies, but not to make substantive changes in the law. See 22 Cal. L. Revision Comm.'s Reports 7 (1992).

¹⁰ See generally, Markey, *California Family Law: Practice and Procedure* (1979 and 1993 Supp.); §§ 23,45[3][a] - [c].

RECOMMENDATION 1

Request the Judicial Council to:

(a) **Fund and adopt as a top priority a study by a trained economist of the application of child support guidelines with the ultimate goal that guidelines would be established which would conform to federal mandates for uniformity and the rebuttable presumption of validity, would reflect fair calculations of the amount required to raise children in a divorcing family, and would not necessarily link amounts due to shared custody; and**

(b) **Approve in principle, urge introduction of, and support legislation that would (1) amend Civil Code section 4700(a) by requiring that the court shall state its reasons in the minutes or on the record for all child support orders; (2) amend Civil Code section 4724 to provide and ensure that children, after divorce, continue to share in the increased standard of living of the higher income parent who may be the noncustodial spouse; and (3) extend the duration of child support obligations and the court's jurisdiction prospectively to age 21 for both children of divorced and intact families subject to existing statutory exceptions and to the right of a parent to petition the court to terminate the support obligation after the child reaches 18 for good cause shown.**

DISCUSSION AND ANALYSIS

- **Awards Are Too Low**

Statistical background. United States census data show that, as of the spring of 1986, 8.8 million women were living with children under 21 years of age whose fathers were not living in the households; 61 percent, or about 5.4 million, of these women had been awarded child support payments. Of the 5.4 million women awarded child support, 4.4 million women were supposed to receive child support for their children in 1985. Of those due payment, *about half received the full amount due*. The

remaining women were equally split between those receiving partial payment and those receiving no payment at all (26 percent each).¹¹

Although the amount of child support *awarded* increased between 1984 and 1986, the proportion of women actually *receiving* payments in 1985 (74 percent) showed no significant change from that of the previous survey (76 percent). The aggregate amount of child support payments *due* in 1985 was \$11.5 billion, but actual payments *received* amounted to about \$7.6 billion. Thus, only 66 percent of the total amount due was paid in 1985. This information is usually referred to in shorthand as this country's \$4 billion unpaid child support debt.¹²

In 1988, Congress passed important child support legislation. To reduce the number of women and children living in poverty and to collect revenues due the states for welfare payments paid to dependent children, the Family Support Act imposed uniform child support guidelines on the states. These guidelines are presumed to be the appropriate amount of child support due, unless rebutted by evidence that would lower or raise the guideline amount.¹³ Although the federal legislation has been in effect for some time, until recently the guidelines were neither required to be uniform nor presumed adequate.

Existing child support levels in California. The Senate Task Force on Family Equity, one of the most influential voices in family law reform in California, recognized that the national crisis in child support awards and payments was acute in this state. The 1987 task force report stated:

*California especially has been impacted by the growth in female-headed households; in 1983 California had the highest number of such households in the United States. Following the same trend as the nation, the number of female-headed households with children under age 18 in California has steadily increased from 565,000 in 1977 to 648,000 in 1986. Of these 648,000 families, 46 percent live on incomes below the poverty level. (Emphasis added).*¹⁴

The report further recognized that the poverty of women and children in California was directly related to the abysmal record of child support awards and collection:

The January-March 1986 Quarterly Report of the Child Support Management System, submitted to the Governor by the California

¹¹ U.S. Bureau of the Census, Current Population Reports, Series P-23, No. 167, *Child Support and Alimony: 1987*, U.S. Government Printing Office, Wash., D.C., 1990, pp. 2-3.

¹² *Id.*, p. 7.

¹³ Family Support Act of 1988, Public Law 100-485, 102 Stats. 2343, codified in various sections 42 U.S. Const.

¹⁴ Senate Task Force Report, p. VI-1.

Department of Social Services, showed the average monthly child support payment collected by district attorneys' offices to be \$159.74 (\$151.22 in AFDC cases; \$167.69 in non-AFDC cases). This amount is less than the national median child support payment reported by the 1983 Census Survey of approximately \$195 per month (\$2,340 annually), and is only slightly higher than the U.S. poverty guideline of \$150 per month per child.¹⁵

The landmark Agnos Child Support Standards Act of 1984, by imposing mandatory minimum support guidelines, was a first attempt to address this problem.¹⁶ The act set support guidelines and mandated higher awards in appropriate cases, a requirement that engendered the development of various sets of discretionary child support schedules.¹⁷ The result was a crazy quilt of overlapping regulations. At one point, seven sets of guidelines were in effect: the Santa Clara version, the Judicial Council version (permitting a 15 percent deviation above or below the Santa Clara levels), the Kern County version (permitting levels about 29 percent below the Santa Clara version), the old Santa Clara version used in Fresno, the Sacramento version, and the version used in Los Angeles' central district (permitting a 20 percent deviation) up or down.¹⁸ Under this legislative scheme, the Judicial Council guidelines would prevail unless a county adopted a different local practice.¹⁹

Perhaps out of concern that this scheme was at odds with the federal intent that child support guidelines be uniform, new Family Code section 4050 expressly states the Legislature's "intention . . . to ensure that the State of California remains in compliance with federal regulations for child support guidelines." For this reason, the provision continues, the Legislature "adopts the statewide guidelines set forth in [the Family Law Code]."

Both as part of the new Family Code and pursuant to previous statutory mandates, the Judicial Council funded a project to study and compare existing

¹⁵ Senate Task Force Report, *supra*, at VI-2.

¹⁶ Civ. Code, § 4720 et seq., amended Stats. 1990, ch. 1493, § 9 (Assem. Bill No. 3974); repealed by its own terms, March 1, 1991. Currently, the child-support guidelines are set forth in Fam. Code, § 4053 (eff. Jan. 1, 1994). The Agnos guidelines continue to have importance, however. Pursuant to Fam. Code, § 4062, "[u]nless contrary to federal law, if the amount of support calculated by this article is less than the minimum amount mandated by the Agnos Child Support Standards Act of 1984, the amount mandated by that act shall be used." Thus, the Agnos guidelines should continue to operate as a "floor" for child-support awards.

¹⁷ Civ. Code, § 4724(b), added by Stats. 1984, ch. 1605, § 4, amended by Stats. 1990, ch. 1493 (Assem. Bill No. 3974), § 19; repealed by its own terms, March 1, 1991.

¹⁸ Norton, *Explaining and Comparing the California Child and Spousal Support Schedules* (1987) 4 California Family Law Monthly 1, 7.

¹⁹ Civ. Code, § 4724(b), added by Stats. 1984, ch. 1605, § 4, amended by Stats. 1990, ch. 1493 (Assem. Bill No. 3974), § 19; repealed by its own terms, March 1, 1991.

guidelines in effect in various locales.²⁰ The Judicial Council also undertook to submit to the Legislature "a proposal for legislation, regarding a system of permanent child support guidelines to comply with federal law." (See Fam. Code, § 4066.) The result of this research may assist California in complying with federal mandates.

Research on child support. The national focus on increasing the amount of child support awarded and collected, and the consistent California history of inadequate awards, have triggered extensive scholarly research. Debate has raged on both the philosophical issue of who should bear the expense of supporting children of divorce and the practical issue of how to implement reforms. It is not the purpose of this report to catalogue and critique this scholarship. One article stands out, however, for its thorough discussion of the myriad issues facing drafters of child support guidelines. Professor Carol Bruch of the University of California at Davis, Martin Luther King, Jr., Law School, has carefully addressed the policy choices that underlie the creation of child support guidelines, admonishing policy makers to be cognizant of these issues.²¹ With increased federal pressure to create uniformity, it is even more crucial for California to participate in this important, ongoing research.

The guidelines game. The advisory committee recognized that California's system of applying child support guidelines had an especially negative effect on single-parent households, which are headed mostly by women. The following issues were of special concern:

1. The guidelines are not uniform.
2. The guidelines are based on data describing the cost of raising children in *intact* rather than in divorcing families.
3. The guidelines are linked to time-sharing arrangements that may have no bearing on the actual time parents spend with their children in the years after divorce.
4. Due to time pressures in our courts, the guidelines are applied routinely as a *ceiling* rather than as a *minimum*, and litigants are allowed insufficient opportunity to rebut the de facto presumption that an award equal to the guideline is adequate.

²⁰ Analysis of California Child Support Guidelines (Oct. 19, 1990) (on file at the AOC), Family Court Services Grant, Political Studies, Inc., The study, however, will analyze only the nature of the guidelines, not the manner and extent of their application by California judges.

²¹ Bruch, *Problems Inherent in Designing Child Support Guidelines*, in *Essentials of Child Support Guidelines Development: Economic Issues and Policy Considerations*, Proceedings of the Women's Legal Defense Fund's National Conference on the Development of Child Support Guidelines, Queenstown, Maryland, September 1986 [hereinafter "Essentials of Child Support Guidelines"].

Associate Justice Donald B. King of the Court of Appeal for the First Appellate District, Division Five, a renowned expert in family law, told the advisory committee:

Support . . . is a real problem. Child support guidelines which we now have in all counties, either by their own adoption, or by Judicial Council guidelines, which are not very great, are based on a fallacy. The only knowledge we have, the only study that's ever been done, . . . [is based on] the costs of raising children in intact families, and yet we take those costs and develop guidelines from them for non-intact families, where there's a second housing cost which is huge.²²

Justice King's view is shared by several scholars critical of guideline formulas that rely on inadequate data to establish the cost of raising children. As one child support expert put the issue: "There is no inherent reason derived from a certain methodology why the consumption level of the one household family unit should be applied to the post-divorce family."²³

Sally F. Goldfarb, a nationally recognized expert on child support, has written persuasively of the need for family lawyers to argue for deviations from established child support guidelines. Goldfarb stresses that guidelines must be deemed a minimum level, not a maximum, in determining child support awards. She also describes some of the significant factors that guidelines across the county fail to take into consideration, including: extraordinary expenses, such as child care or medical expenses; the noncustodial parent's failure to exercise rights to extended visitation or joint physical custody; and the increased standard of living of the payor spouse after divorce. To the extent that these factors are not reflected in existing child support guidelines, the custodial spouse, usually the mother, will suffer.²⁴

Practicing family lawyers who testified at the public hearings and the regional meetings agreed that child support guidelines were less than satisfactory in both conception and application. This inadequacy appears to apply whether the mandatory minimum is at issue or whether a larger discretionary amount may be awarded, and regardless of the income level of the family. One attorney observed that, at the time the 1984 Agnos legislation was debated, claims were made that the mandatory minimum was too low. The response given was that the minimum would provide a floor only, and that the proposed discretionary guidelines were just that: "guidelines." The attorney concluded: "In practice, however, courts will almost never award more

²² San Francisco public hearing transcript, p. 187.

²³ Polikoff, *Looking for the Policy Choices Within an Economic Methodology: A Critique of the Income Shares Model*, *Essentials of Child Support Guidelines*, *supra*, p. 33.

²⁴ Goldfarb, *Working with Child Support Guidelines* (April 1989) 25 Trial 43-47.

than the guidelines, and the guidelines, in our opinion, bear no relationship to how much it costs to support a child."²⁵

Betty Nordwind, executive director of the Harriet Buhai Center in Los Angeles, concurred in this view. The Harriet Buhai Center is the largest provider of family law services in Los Angeles County, with 75 percent of the client population women and 25 percent men. In addition, 90 percent of the client population is minority.²⁶ Nordwind persuasively argued for the need to conduct legislative hearings on the optimum amounts for child support guidelines.

Middle-class parents appear to fare no better under the current guidelines. An attorney who represented mostly middle-income parents stated:

The guidelines do tend to be . . . [the] awards of child support in Orange County, [and] in my kinds of cases where there is not somebody who is wealthy, this definitely means that the parent with the primary amount of parenting time is very much disadvantaged economically. The guideline awards tend to be, perhaps, enough to meet the basics, shelter, every-day clothing, food, maybe, assuming that they are going to be paid. And when you start getting to the fees for soccer or ice-skating or baseball or school field trips or prom dresses or prom tuxes or any other extraordinary expense beyond the basics, not to mention things like medical care and child care, that parent is definitely on the short end of the financial stick.²⁷

The public perception of child support levels parallels that of attorney-experts. Susan Speir, president and founder of Single Parents United 'n Kids (SPUNK), stated: "Women feel that the judges do not have any idea of what it costs to actually raise a child. They also think that the judges feel sorry for the non-custodial parent who is ordered to pay, and that if the judge orders a lower amount, then the custodial parent will surely pay."²⁸

Case law, too, reflects the fact that trial judges stray from the actual intent of guideline legislation: that is, that mandatory minimums should be used as a ceiling not as a floor, and that discretionary guidelines may be exceeded in a proper case. For example, in *In re the Marriage of Hanchett* (1988) 199 Cal.App.3d 937, 942-44, the trial court denied a child support increase on the ground that the mother had failed to show need, even though the child support was *below* the Agnos minimum. The appellate court reversed, holding that, absent exceptional circumstances, the minimum level must be awarded without regard to discretionary factors such as need and ability

²⁵ Los Angeles public hearing transcript, p. 91.

²⁶ *Id.*, p. 156-61.

²⁷ Orange County regional meeting summary, p. 4.

²⁸ Los Angeles public hearing transcript, p. 212; see also testimony of Lucianne Ranni, then coordinator, National Organization for Women, Ventura-Oxnard Chapter, Los Angeles.

to pay. At the other end of the economic scale, a trial court denied an increase in child support that would have reflected a very large increase in the supporting father's standard of living. The appellate court reversed, holding that the trial court must take into consideration the living standards of both parents when setting child support, and must grant or modify awards beyond the bare necessities of life if possible. The court further held that a child has a right to expect to share in the improved lifestyle of his or her parents.²⁹

The judges' response to a survey question on the need for changing child support guidelines was equivocal, suggesting a need for judicial education in this area. The survey asked, "If you could change the child support guidelines now in effect, what changes, if any, would you make?" This question did not provide choices for the respondents, but instead asked for an individual answer. Of the judges who responded, 55.3 percent provided some suggestion for change. The most common suggestion was to compensate for different factors, such as cost of living increases or a third income. On the other hand, 39.5 percent saw no reason to change the guidelines.³⁰ This apparent disagreement among judges about the need for change in the guidelines is significant, considering the testimony at the hearings that the guidelines are often used as a ceiling. Some judges may be unaware that the guidelines are insufficient and may exacerbate the insufficiency by rarely deviating from them. Judicial education can and should provide more information about the actual costs of raising children.

Duration of Child Support. A controversial issue that has been pending on the family law legislative docket for several years is the question of how long the obligation to support our children extends. Since the change in the age of majority from 21 to 18, the child support obligations of supporting parents have terminated at 18. Needless to say, in many families, age 18 marks the beginning of perhaps the most costly period in a child's life—the commencement of higher education. The need for child support during this crucial period was recognized by the Senate Task Force on Family Equity³¹ and has been the subject of several legislative proposals. Nonetheless, Family Code section 3901 continues the preexisting rule that support generally ends at age 18.

Researchers Judith S. Wallerstein and Shauna B. Corbin found:

Within the average middle-class family, children anticipate that their educational aspirations will be acknowledged and that serious plans to pursue a college education will be encouraged and economically supported by parents to the extent of their capacity to do so. Such expectations appear to be severely shaken by divorce. Findings over the ten-year

²⁹ *In re Marriage of Catalano* (1988) 204 Cal.App.3d 543, 550–56.

³⁰ Judges' Survey, question 37.

³¹ Senate Task Force Report, *supra*, at VI-6 – VI-9.

period that was brought to a close in 1982 show that child support payments, which were established and maintained with varying degrees of regularity when the child was young, were generally not revised upward when the same youngster entered adolescence, and were terminated abruptly when the youngster reached age eighteen. Thus, at the point of entry into college, when the young person's need for financial support and encouragement to pursue goals commensurate with his or her intellectual capacity customarily increases, financial support ceased altogether or was maintained at minimal levels, conveying a lack of emotional investment in the youngster's education strangely at odds with the father's social position and professed values.³²

The remedies. As we have seen, child support awards are, in the first instance, based on statutory minimums or guidelines that are derived from imperfect data and questionable concepts; they are adhered to rigidly more often than they are exceeded; and they are imposed for too short a period. In an effort to correct some of these problems, all of which negatively affect women who are the primary caretakers of children, the advisory committee members agreed that:

- An immediate reassessment of guideline amounts should be undertaken, both to comply with federal mandates and to reflect more accurately the actual cost of raising children by custodial parents in a divorced family;³³
- A judge who awards the mandatory minimum or the guideline amount should be required to state the factors on which the judge relied in setting the amount at the minimum level rather than a level above the minimum, which would have provided the child with more than the bare necessities of life;
- A child's right to share in the increased living standard of a parent should be codified; and
- The period of child support obligation should be extended prospectively until the child reaches the age of 21.

³² Wallerstein and Corbin, *Father-Child Relationships After Divorce: Child Support and Educational Opportunity* (1986) 20 Family Law Quarterly 109, 110; and see generally the later book based on the same research: Wallerstein and Blakeslee, *Second Chances: Men, Women and Children a Decade After Divorce* (1989).

³³ The Statewide Office of Family Court Services funded a beginning study of child support guidelines, but the study did not address the way guidelines are applied.

RECOMMENDATION 2

Request the Judicial Council to:

- (a) Approve in principle, urge introduction of, and support legislation that would modify or repeal Civil Code section 4727 so that shared physical custody for more than 30 percent of a 365-day period will not automatically require a reduction in child support obligations; and**
- (b) Instruct the Advisory Commission Legal Forms to modify the family law forms to reflect notice of the provisions of Civil Code section 4700(b) for recovering child care expenses when the non-custodial parent fails to fulfill caretaking responsibilities, and to propose simplified application procedures for recovering the expenses.**

DISCUSSION AND ANALYSIS

- **Awards Are Used as Custody Bargaining Chips**

As the Senate Task Force on Family Equity recognized, current law and the inherent formula upon which guidelines are based have institutionalized the practice of using custody as a bargaining chip to lower support obligations. The Task Force report states:

Current child support law provides an incentive to bargain over custody of the child by directly linking the amount of child support to the type of custody arrangement. Civil Code section 4727 permits the court to reduce the mandatory minimum child support award [if the child is not receiving AFDC] where the obligor-parent is awarded 30 percent or more custodial or visitation time with the child. The Judicial Council's discretionary guideline expressly includes the amount of time the child spends with each parent as a factor in the support formula. [California Rules of Court, Div. VI, §§ 2(a) and 5.] These laws treat the parents' homes as "hotels," allotting support based on the number of nights the child sleeps in each.³⁴

³⁴ Senate Task Force Report, *supra*, p. VI-23.

The policy implications of the applicable laws were similarly recognized by the task force:

Moreover, when custody and support are tied to the amount of support awarded, the focus may shift from what is best for the child to what is least expensive for the obligor-parent. Civil Code section 4727, by allowing for decreased support with increased visitation or joint custody, provides financial incentives for the obligor-parent to seek joint custody in order to lower his (or her) support obligation. Similarly, this statute creates disincentives for the lower-income parent (usually the mother) to agree to increased visitation or joint custody. Instead of focusing on what would be the best custody arrangement for the child emotionally, the lower income parent may be forced to base the custody decision on what will be best for the child economically—e.g., sole custody because it will increase the support award.³⁵

The interplay between custody and support adversely affects the parent with primary custody, usually the mother, in two ways. First, the initial calculation of the award results in a lower award based on the time that is spent by the other parent with the child—even though that time commitment may not have any bearing on the actual costs borne by the primary custodian. Second, the underlying custody arrangement upon which the support award is based may not be honored. These two factors were readily recognized by the attorneys who participated in the regional meetings and public hearings. A San Diego certified family law specialist stated:

But one [situation] that happens quite frequently in this county and in other counties, perhaps, is a father, for instance, suggesting that . . . joint physical custody is very important to him. That he wants not only quality time, but quantity time with his children, and I think that that's a . . . wonderful motivation as long as it's in good faith.

Now, one thing that I'm finding quite often is that dad says that, and dad gets that, and dad also gets something else when he gets that, generally, he gets a smaller child support award. And then, lo and behold, dad doesn't exercise that joint custody that he fought so vehemently for.

All of a sudden he's on a more traditional, once every other weekend, once a month, maybe on Christmas, all of a sudden the children aren't hearing from dad at all, and what mom has is the children on a full-time basis, which she probably likes, but she has half as much money as she would have had had it [been] a traditional child custody and child support situation.

³⁵ *Id.*, p. VI-23 – VI-24.

Her remedy, then, . . . is to go back to court, and more times than not, there's a financial disparity. It's going to cost mom to go back, if she even has any money to obtain the services of an attorney, she probably is going to get a token award of attorneys' fees at the end.³⁶

And in response to a question as to the frequency of this phenomenon, the certified specialist explained to committee members:

I think it's so common that that's what makes me suspect the motive, and . . . I hate to apply bad faith to anyone, but it's so suspect because it happens so often. I believe part of it is also that men are more enthusiastic in the beginning of a proceeding concerning the children, from a good faith perspective, that they think they want to spend more time with the children.

. . . I do suspect also, though, and this maybe is a big part of the system, I think they're also being told by counsel, well, that's good, because . . . one of the results of that will be that your child support will probably go down if you're successful.³⁷

Mediators, too, as they strive to assist parents in reaching custody agreements, recognize that support is an important chip in the family poker game. As stated by Dr. Mary Duryee, former Director of Family Court Services for the Alameda Superior Court, "You overhear people in the hallway saying, now, how many days do I need to get before my child support obligation is reduced, and you get a mixture of motivation in people coming in asking for more time with their children, when what they're really asking for is less money."³⁸

To reduce the two aspects of this inequity, with its disparate impact on divorced women, the advisory committee proposed that the statute linking support and custody be modified or repealed.

With passage of the Family Code, the Legislature made a start toward reform. Family Law Code section 3028(a) provides for recovery of child care expenses incurred when the noncustodial parent fails to fulfill caretaking responsibilities.³⁹ This statute at least partially recognizes that custody arrangements ordered by the court, either pursuant to stipulation or after a contested hearing, may be very different from the actual behavior of the parties once judgment is entered. The statute, however, does not provide a sufficiently expedient way in which a spouse may enforce the

³⁶ San Diego public hearing transcript, pp. 116–17.

³⁷ *Id.*, p. 123; see also Los Angeles public hearing transcript, pp. 286–87 (testimony of Patsy Ostroy); Orange County regional meeting summary, p. 4; and Butte County regional meeting transcript, p. 20, in *id.*, p. 1.

³⁸ San Francisco public hearing transcript, p. 234.

³⁹ See also Civ. Code, § 4700(b), repealed Stats. 1992, ch. 162, § 3 (Assem. Bill No. 2650); eff. Jan. 1, 1994.

collection of these amounts. Accordingly, the advisory committee recommended that the Judicial Council provide for simplified procedures for collecting these amounts and for notifying parents of their right to collect child care expenses if caretaking responsibilities are neglected.

RECOMMENDATION 3

Request the Judicial Council to:

- (a) Review compliance with the statute that requires the superior court clerk to distribute booklets explaining parents' rights and duties relating to child support and augment and improve those efforts; and**
- (b) Study whether a system of informal assistance for unrepresented parties can be extended to parents seeking to collect unpaid child support or other forms of support such as medical insurance, medical expenses, and day-care costs.**

DISCUSSION AND ANALYSIS

• Child Support Is Too Often Uncollectible

A general consensus exists that district attorneys' offices are failing to collect child support in sufficient amounts, especially for non-AFDC parents. Court practices that render the collection of support even more difficult, as enumerated by commentators and public hearing participants, include failure to order contempt or jail time, ordering small installment payments even when amounts in arrears are very large, and marked inefficiencies in clerks' offices. Attorneys pointed out that often the impecunious spouse cannot afford the assistance of private counsel to enforce child support, the district attorney has insufficient resources to assist all who need help, and the law of enforcing support is too complicated for easy self representation.⁴⁰

The advisory committee determined that expanding public information and exploring ways to provide public assistance in collecting child support would be the most effective mechanism within the purview of the Judicial Council for improving the collection rate.

⁴⁰ Letter to the AOC from the California Family Support Council, dated Oct. 30, 1986 (on file at the AOC).

Effective January 1, 1988, Welfare & Institutions Code section 11475.5, which was one of the original legislative proposals suggested by the Senate Task Force on Family Equity, mandated distribution of a booklet about the proper procedures for collection and payment of child and spousal support. The booklet, drafted by the Department of Social Services and reviewed by the Judicial Council, was to be distributed by superior court clerks and served on all respondents in family law matters. (No evaluation of the booklet or the effectiveness of this process has been conducted to date.) A spot check of compliance in Bay Area counties revealed that booklets were in short supply, and although sometimes available, they were not routinely distributed to prospective petitioners for dissolution. For example, a law clerk employed at the Administrative Office of the Courts called the clerk's office in a Central Valley court and asked what information was available on child support. He was not told about the booklet until he specifically mentioned to the clerk that he thought a booklet was available. The advisory committee proposed that the Judicial Council monitor the progress of this legislation and seek to augment or improve its operation.

The advisory committee also proposed that the Judicial Council study whether it is feasible to create a system of assistance for parents seeking to collect child support in the superior courts. Code of Civil Procedure section 116.260 mandates a system of assistance for small claims litigants. This program has had marked success and may be appropriate for extension to family law litigants. Many of the issues facing small claimants involve enforcing their judgments. The training and experience of small claims advisors may be equally helpful to collect support orders. Given the inability of most to retain counsel and the lack of resources of the district attorneys' offices, some assistance is urgently needed.

2. SPOUSAL SUPPORT

FINDINGS

The advisory committee's review and analysis of spousal support occurred during the development of critical reforms begun by the Senate Task Force on Family Equity. One of these reforms, effective January 1, 1989, codified the holdings of appellate cases requiring that the standard of living during the marriage should serve as a point of reference in determining the award of spousal support.⁴¹ A second reform, effective July 1, 1990, imposed an automatic wage assignment in a spousal support

⁴¹ See Civ. Code, § 4801(a), repealed Stats. 1992, ch. 162, § 3 (Assem. Bill No. 2650); now contained in Fam. Code, § 4320(a).

award that, absent a stay order, permits an *immediate* assignment of wages, rather than one effective only after arrearages are demonstrated.⁴²

The advisory committee's findings corroborated the views of the Senate Task Force on Family Equity report that triggered these reforms. The committee decided that it would be most useful to submit recommendations that would require monitoring of these reforms to ensure that the intent of the task force, the advisory committee, and the Legislature are carried out and to alert the committee to the need for further reform.

With respect to spousal support, the advisory committee found:

1. Historically, spousal support awards have been infrequent and, when issued, have been insufficient in amount and duration.
2. The unpredictability and insufficiency of spousal support awards have unfairly affected two groups of women: the older homemaker who has had no significant employment outside the home, and the younger mother with children who has experienced a gap in employment history due to her attention to child-rearing duties.
3. Spousal support arrearages cause financial reversals for the supported spouse that make it difficult to retain counsel to launch a collection effort.
4. Specific reforms, including those designed to increase the amount of spousal support and its duration in proper cases and to provide an automatic method of collection that will not require the assistance of counsel, should be monitored to ensure that no further reform is necessary.

RECOMMENDATION 4

Request the Judicial Council to ask the Family Law Advisory Committee to complete a study of spousal support orders including a review of whether the orders are achieving the purpose of Civil Code section 4801(a) concerning the standard of living during the marriage as a point of reference in determining spousal support and compliance with Civil Code section 4390.3 providing for automatic wage assignments in spousal support awards; and propose recommendations for modification of spousal support laws to the Judicial Council, if necessary,

⁴² Civ. Code, § 4390.3, added by Stats. 1989, § 1, repealed by Stats. 1992, ch. 162 (Assem. Bill No. 2650), § 3; now see Fam. Law Code, §§ 5230, 5231, 5260.

including consideration of whether spousal support guidelines would be appropriate.

DISCUSSION AND ANALYSIS

• Pioneering Work of the Senate Task Force on Family Equity

The Senate Task Force on Family Equity was convened to examine the conclusions contained in Dr. Lenore J. Weitzman's book, *The Divorce Revolution*, a landmark study that has transformed the national family law landscape. The Task Force reviewed the information in Weitzman's book, augmented it, and proposed specific changes in California law designed to implement reform.

In general, the task force found the following:

- a very low percentage of women received spousal support awards and that their numbers were not increasing;
- the average award issued provided supported women with an inadequate standard of living close to the poverty line;
- these conclusions applied even to women in marriages of long duration;
- the period for which support was awarded was getting shorter since the advent of no-fault divorce;
- inadequacies in spousal support rendered the failure to collect child support even more crucial for women with primary care of minor children;
- the inadequacies in spousal support awards affected mainly two groups of women: older homemakers with little or no work experience outside the home and younger women with minor children who were devoting their time and energies to raising children;
- the view that women who had been supported during marriage should be able to become self-supporting quickly was based on false assumptions about the ease with which women could become employed and a lack of knowledge about job discrimination and age discrimination against women in the labor market; and
- judges failed to appreciate the economic plight of divorced women and devalued homemakers' services in making spousal support awards.⁴³

This research has been corroborated by others, including Dr. Judith S. Wallerstein in her longitudinal study of 60 families of divorce. Dr. Wallerstein's eloquent description of the plight of the older women in her small sample describes more personally what other researchers have also identified:

⁴³ Weitzman (1985) *The Divorce Revolution*, pp. 143–214; Senate Task Force Report, *supra*, pp. V-1–V-20.

Ten years after divorce, the older women stand out from other groups in our study. With one or two major exceptions, they undergo much less psychological change, explore fewer second chances, and have less sense of pride or accomplishment than their younger counterparts. They do not shift gears psychologically or socially. Eighty percent are insecure financially and almost half experienced a decline in their standard of living in the five previous years. . . .

Tragically, many courts, not recognizing the greater difficulty that divorce poses for older women, treat them as no different from thirty-year-olds, with the admonition "You are able-bodied, so go out and sell your house, get a job, and carry your own weight in society." This attitude overlooks the psychological, economic, and social barriers that older divorced women face. Ironically, many dating services are more realistic; men *willing* to date women over fifty are invited to join at half price.⁴⁴

- **Reform Triggered by Case Law**

Immediately after passage of no-fault divorce, some judges recognized that the new law might adversely affect a newly identified group of women referred to as "displaced homemakers." In *In re the Marriage of Brantner* (1977) 67 Cal.App.3d 416, the appellate court reviewed a spousal support order for \$200 per month for 2 years, \$150 per month for 2 years, \$100 per month for 2 years, \$50 per month for 2 years, and \$1 per month for 4 years, followed by the termination of support. The parties had been married for 25 years; they had two children, ages 14 and 16. The wife was 44 years old, had not completed high school, suffered from both arthritis and iritis, faced the possibility of becoming blind, and had no apparent job skills. In holding that the trial court's order was an abuse of discretion, the appellate court stated:

The new Family Law Act, and particularly Civil Code, section 480l, has been heralded as a bill of rights for harried former husbands who have been suffering under prolonged and unreasonable alimony awards. However, *the act may not be used as a handy vehicle for the summary disposal of old and used wives. A woman is not a breeding cow to be nurtured during her years of fecundity, then conveniently and economically converted to cheap steaks when past her prime. If a woman is able to do so, she certainly should support herself. If, however, she has spent her productive years as a housewife and mother and has missed the opportunity to compete in the job market and improve her job skills, quite often she becomes, when divorced, simply a "displaced homemaker."* (Emphasis added.)⁴⁵

⁴⁴ *Second Chances*, *supra*, pp. 50–51.

⁴⁵ *In re Marriage of Brantner* (1977) 67 Cal.App.3d 416, 419.

Justice Gardner's prophetic remarks in *Brantner* bear remarkable similarity to later cases, a fact which suggests that not much change has occurred in the more than 16 years since his opinion.

Dr. Wallerstein's observation that many courts fail to recognize the plight of the older woman is made manifest in a case whose facts pre-date the reforms proposed by the Senate task force. In *In re Marriage of Gavron* (1988) 203 Cal.App.3d 705, 709-10, a California trial court abruptly terminated a \$1,100 per month spousal support award and chastised the supported spouse. The appellate court quoted from the trial court's order as follows:

Aside from demonstrating a lack of diligence, in regards to becoming employed, [wife] remains highly improvident by relying on [husband] for her sole support. She apparently has given no thought to the possibility that [husband] may become incapacitated or meet an untimely demise. It should be noted that a marriage of twenty-five (25) years is not tantamount to social security. The Court is mindful that this is a lengthy marriage and that [husband's] duty to support [wife] will not terminate by the mere passage of time. Nonetheless, the [wife's] failure to become employable or seek training after so many years shift[s] the burden to her to demonstrate her continued need for support in light of her continued inaction in this regard.

Mrs. Gavron was 57 years old; she cared for her 87-year-old mother; and she had health problems. Her failure to seek employment or retraining had occurred over an eight-year period. The appellate court reversed and held that the abrupt termination of spousal support with no explicit earlier warning to Mrs. Gavron that she had a duty to become self-supporting constituted an abuse of discretion. The court noted that Mrs. Gavron had "presumably devoted herself initially to the development of her husband's earning capacity, rather than to her own earning capacity, then to wifely and parental duties" ⁴⁶

The case of *In re Marriage of Ramer* (1986) 187 Cal.App.3d 263 presented "repeated . . . abuses of discretion" by the trial court that then-Judge Kaufman deemed "a continuing miscarriage of justice of which we have seldom seen the like." ⁴⁷ In *Ramer*, the supported spouse had been married to her husband for 22 years, at the time of the first trial had four children, two of whom were minors and one of whom had a learning disability, had no special skills or training that would qualify her for remunerative employment, and there was evidence that she was not in good health. She also had responsibility for keeping up the payments and property tax on the family

⁴⁶ *In re Marriage of Gavron* (1988) 203 Cal.App.3d 705, 712.

⁴⁷ *In re Marriage of Ramer* (1986) 187 Cal.App.3d 263, 267.

home, yet the husband shared the tax deduction. On appeal from the trial judge's first order, spousal support of \$550 per month was held to be unconscionably low, and the case was reversed and remanded. Upon remand, the trial court increased the amount of the award to \$900 and ordered the husband to pay a substantial arrearage (\$10,500) at the rate of \$100 month. During the interim, the husband's income and that of his new wife had substantially increased. The court squarely held, quoting from earlier decisions, that "[w]hen the order made by the trial court affords one of the spouses a significantly higher standard of living than the other and affords the other a significantly lower standard of living than was accustomed during the marriage, an abuse of discretion is indicated."⁴⁸ The court viewed the small amount required to be paid to retire the arrears as a further abuse of discretion.

This case is important for two reasons. First, it delineated unequivocally the importance of using the standard of living during the marriage as a point of reference for determining spousal support. And, second, it clearly demonstrated the recalcitrance of some trial judges to make appropriate spousal support awards—despite sharp and repeated messages from the appellate courts. When the low appeal rate in family law cases and the expense of launching an appeal are considered, together with the likelihood that other trial judges are committing similar abuses, the plight of the older, divorced woman in the courts becomes fully dramatized.

- **Receipt of Corroborating Testimony**

Attorneys and others who testified at the public hearings and regional meetings corroborated the findings of Dr. Wallerstein and the Senate Task Force on Family Equity. Two portions of the testimony stand out. A San Diego certified family law specialist told the advisory committee:

We're talking about a family in which, as one of our local judges calls them, the wife is a dinosaur. Lovely. That means that she has been married for probably 25 to 35 years, her sole career is homemaker. She is now . . . faced with becoming a single person, probably [for] the rest of her life, and she has no ability to be self-sustaining in any meaningful way. That's one profile.

Another profile is a younger person who has done the same thing, who has done it for a little less long, and probably has an ability at least to attain some personal satisfaction in a career, but a little differently than if she hadn't spent the 20 years between 20 and 40 being a homemaker. And then there are lots of other variations.⁴⁹

⁴⁸ *Id.*, p. 273.

⁴⁹ San Diego public hearing transcript, pp. 121–22.

Another attorney put it differently:

Number one, oftentimes the wife . . . has been the homemaker, [and] does not have the knowledge, or the exposure to the activities of the husband outside the home. You have a situation where a husband generally has put years into his career, and at the end of this marriage, he will continue to move forward with an increased earning capacity based upon the years of experience that he has had outside the home.

What has been found is that at the end of the divorce, the woman is financially, if she's lucky, going to tread water, and very probably will be moving backwards. Part of the reason is that she is now forced out into the work force. Child support and spousal support awards are wholly inadequate. . . .

There are assumptions that now that women have equal parity in the work force, that they can earn equally. The fact is, there is no equal parity in the work force. There's all sorts of institutional discrimination. Women, generally speaking, are still the primary caretakers, even after the marriage dissolves.

What are the future opportunities for them? Well, they're very limited. Number one, if they have been homemakers as their primary occupation during the marriage, [and] they go out into the work force, they face age discrimination, sex discrimination, [and] job discrimination by the very nature of the fact that women still are classified in the lower paying job categories.

I see this happen all the time Frequently I represent a woman who has been a homemaker as her primary occupation, leaves a marriage where the husband makes \$150,000-\$250,000 a year, and I see her over at Robinson's selling perfume for \$4.50 an hour and being threatened by her husband that because of this job, he's going to take her back to court to reduce her spousal support.

This is just an example, but I can tell you, it is an example that could apply throughout this state.⁵⁰

This testimony and the trial court decisions discussed earlier illustrate another aspect of gender bias operating in the consideration of requests for spousal support. The older woman is a "dinosaur" whose dependence and inability to become self-sufficient may be distasteful to the trial court judge. Without clear and equitable standards for setting spousal support awards, these stereotypes will inevitably influence the outcome of requests for spousal support and requests to terminate it.

⁵⁰ Los Angeles public hearing transcript, pp. 147-49.

- **The Remedy**

Possible remedies for these problems of spousal support have already been enacted, through specific legislative incorporation of the standard of living during the marriage and through the imposition of automatic wage assignments in spousal support orders. Responses to the Judges' Survey indicate that implementation of these reforms may not be uniform among judges. Judges were asked how a finding on the standard of living in the marriage as required by Civil Code section 4801 would affect their spousal support awards with respect to amount and duration. Of the judges who responded, 41.9 percent said that the finding should affect the *amount* but not the *duration* of spousal support.⁵¹ In contrast to these responses, a well-regarded handbook on California family law, in describing the new provision, clearly states: "These statutory provisions effectively incorporate prior case law consensus that the marital standard of living should be used as a *point of reference* in the court's weighing process; i.e., spousal support awards, *both in terms of amount and duration*, should reflect the parties' *accustomed* standard of living during marriage." (Second emphasis added).⁵²

Accordingly, the advisory committee proposed that these new reforms be monitored to ensure compliance with the intent of their framers. The monitoring should include the collection of statistical data on the frequency, amount, and duration of both original and modified spousal support awards.

3. CUSTODY

FINDINGS

The advisory committee received over 50 letters of comment relating to custody issues. The letters were predominantly from parents and grandparents who had been involved in custody disputes. Some of the letters were from step-parents; some were from neighbors. Although a majority of comments related to bias against women in custody, a significant number related to bias against men. No one view predominated. The experiences related were poignant, sometimes tragic, harrowing and heartrending. The advisory committee also reviewed the extensive literature on the issue of joint custody and its history, development, and advisability. Witnesses discussed joint custody at the public hearings from the perspectives of judge, attorney, parent, and mediator.

The evidence received by the committee showed that bias, or the perception of bias, against both men and women exists in custody decisions. The evidence is

⁵¹ Judges' Survey, question 38.

⁵² Hogoboom and King, *California Practice Guide: Family Law* (1989), § 6.111, pp. 6–199.

conflicting, however, on what objective standard should be applied in custody decisions to reduce the likelihood of bias. This report is not intended to resolve the great custody debate on the appropriate standard raging in California and nationally. Rather, the committee examined issues that might assist the courts in rendering bias-free decisions in an admittedly difficult area of the law.

With respect to custody, the committee found:

1. When judges are asked to make custody decisions, they do so within a relatively uncharted zone of discretion, and biases about the proper roles of women and men inherently affect those decisions.
2. Most custody decisions are made between the parents themselves or with the assistance of counsel or a mediator. Mediators and attorneys may be just as likely to be influenced by gender stereotypes.
3. Bias in custody decision-making is best cured by judicial, attorney, and mediator education.
4. Research on the nature of custody arrangements that will truly be in the best interests of our children is urgently needed.
5. Custody battles should be resolved as quickly as possible, and custody trials should be given the preference accorded them by statute.

RECOMMENDATION 5

Request the Judicial Council to target the study of joint custody and acquiring more information about best interests of children as a top priority for further research funded by the Family Court Services Program and for the relevant educational programs planned and administered by CJER and the AOC.

DISCUSSION AND ANALYSIS

- **The Joint Custody Debate**

The crucial issue in the debate over joint custody is whether joint custody should be imposed over one parent's objection. A research report published in the *Congressional Quarterly* provides an excellent summary of the nature and extent of that custody debate. The article emphasizes the following points:

1. Women's groups support a primary caretaker standard in custody determinations and oppose imposition of joint custody over the objection of either parent. They point to problems created when spousal abuse has occurred and to the use of custody requests as a bargaining chip to lower support. They rely on research showing that, in high conflict families, joint custody has an adverse impact on children. They contend that lack of agreement about custody already indicates a high degree of conflict in the family; if the parents agreed, no court resolution would be required. They object to joint custody as the court's way of abdicating responsibility and saving court time.
2. Father's rights groups and many mediators, on the other hand, say that even if parents disagree about custody they should and can learn to cooperate for their children's benefit. They contend that fathers who are involved with their children are more likely to pay child support, not less likely. They also believe strongly that mental health professionals are more suited than the court system for determining difficult questions of custody. They believe that because men historically have been left out of custody determinations, especially with respect to young children awarded to mothers based on the "tender years" doctrine, recompense should now be made.⁵³

The American Bar Association has adopted a model joint custody statute that permits the award of joint custody over the objection of one of the parents. The debate on the issue was acrimonious. While the joint custody provision prevailed, a separate provision urging each state legislature to adopt the model statute was defeated.⁵⁴

Some scholars choose a middle ground in this debate. They suggest that joint custody itself is not inappropriate, but the way it has been implemented is. For example, Professors Bartlett and Stack have argued that the defects cited by some researchers can and should be remedied. Specifically, they suggest that joint custody is inappropriate where spousal abuse has occurred. They further contend that a parent should be permitted to oppose joint custody in good faith without being characterized as impeding the child's frequent and continuing contact with the other parent. (See Fam. Code, § 3087, formerly Civ. Code, § 4600.5(i).) They also contend that child support should not be linked to time sharing, and that women and children should not

⁵³ Glazer, *Joint Custody: Is It Good For the Children?* Congressional Quarterly's Editorial Research Reports (Feb. 3, 1989), pp. 60, 62, 66, 69.

⁵⁴ *ABA Approves Resolutions on Joint Custody, Taxation* (Aug. 22, 1989) 15 Family Law Reporter 1494.

be forced to accept a lower standard of living in exchange for the custody rights of fathers.⁵⁵

- **The Debate in California**

The new Family Code, effective January 1, 1994, codifies preexisting law regarding the issuance and implementation of joint custody orders.⁵⁶ If the parties agree, there is a presumption that joint custody serves the best interests of the child. If one party objects, then the court must look to a series of factors enumerated in Family Code section 3022. These factors include the child's health, safety and welfare, any history of child abuse, and the nature and amount of contact with both parents. Language has been added to the statutory scheme to clarify that there is no legislative preference for joint custody, absent parental consent.⁵⁷

The Senate Task Force on Family Equity, the principal proponent of according no legal preference to joint custody, made a series of findings on this issue. The task force recognized that, based on 1985 data, 90 percent of children living in single-parent homes live with their mother. The report criticized the supposed preference for joint custody as imposing financial hardship on women and children. The task force called for reform where spousal abuse is alleged and for research on the effects of joint custody on children, especially small children.

California researchers concede that the information we have about the effects of joint custody on children is limited. Some preliminary findings from admittedly small samples suggest that children suffer when joint custody is ordered in high-conflict families.⁵⁸

- **Testimony Reviewed by the Advisory Committee**

Testimony received by the advisory committee reflects the deadlock perceived nationally. In general, commentators agree that men are less likely to be awarded sole custody of their children than are women. Justice Donald King said:

⁵⁵ Bartlett and Stack, *Joint Custody, Feminism and the Dependency Dilemma* (1986) 2 Berkeley Women's Law Journal 35–41.

⁵⁶ See Civ. Code, § 4600.5; repealed Stats. 1992, ch. 162, § 3 (Assem. Bill No. 2650); eff. Jan. 1, 1994; now see Fam. Code, §§ 3080–89, 3002–04, 3006, 3024–25.

⁵⁷ Civ. Code, § 4500(d); repealed by Stats. 1992, ch. 162 (Assem. Bill No. 2650), § 3, eff. Jan. 1, 1994; now see Fam. Code, § 3040(b). ("This section establishes neither a preference nor a presumption for or against joint legal custody, joint physical custody, or sole custody, but allows the court and the family the widest discretion to choose a parenting plan which is in the best interests of the child.")

⁵⁸ Outcomes in Joint and Sole Custody Families: Findings From Different Populations and Social Policy Implications (1988) Center for Family in Transition (on file at the AOC).

Custody and visitation, terrible issues. We have bias. This is probably an area where we have . . . more gender bias than anywhere else, in anything we do in the family law courts, but it's inherent in the people that come in.

We don't have people come in where both people have been playing meaningful parenting roles. Ninety percent of the people that come into courts, one has . . . had the responsibility for child rearing, and the other one has had the responsibility for servicing the car and mowing the lawn. And you're not going to, in that kind of situation, all of a sudden now have co-equal parenting, it just doesn't work that way.

These people have developed their own structure, and now the marriage has fallen apart, and there's nothing the court's going to do to change that structure. If someone has not taken a meaningful role in child rearing during the marriage, it's unlikely they're going to take a meaningful role afterwards, or certainly, they have to prove that that's what they're going to do.⁵⁹

According to at least one attorney who testified, Justice King's observation would support the primary caretaker standard for awarding custody. At the San Francisco public hearing, Attorney Margaret Gannon took this position and also described elements of bias against women in custody determinations, including penalizing mothers with limited financial resources, on the one hand, and questioning the parenting abilities of mothers who work full-time, on the other hand.⁶⁰

California witnesses, even those who generally favor joint custody, called for more research. Hugh McIsaac, former Director of Family Court Services for the Los Angeles Superior Court, acknowledged the need for research in light of conflicting studies,⁶¹ as did Dr. Janet Johnston, who explained her own research and described the suffering of children from high-conflict families. She stated:

[T]here is very little knowledge in the field, and there are not even any ongoing research studies upon which family court services workers can draw to effectively argue a particular custody choice, or to argue a suspension or limitation of visitation in order to protect children from disturbed parents, or from highly conflicted family situations after divorce. More research is needed which directly examines the impact of the California courts on children's adjustment.⁶²

Custody issues generally evoked a dramatic juxtaposition of public views during the hearings. Eloquent spokespersons from the fathers' movement, such as

⁵⁹ San Francisco public hearing transcript, pp. 184–85.

⁶⁰ See San Francisco public hearing transcript, pp. 203–04.

⁶¹ Los Angeles public hearing transcript, pp. 144–45.

⁶² San Francisco public hearing transcript, pp. 215–16.

James Cook, presented their view of discrimination against men in custody decisions and the need to ensure that children have equal contact with both parents.⁶³ Vivid portrayals of custody nightmares were also described by women who were forced to move long distances when their former spouses moved or sacrifice custody of their children and by those with small children who frequently traveled alone by plane in compliance with a custody order.⁶⁴ While the members of the advisory committee were often moved by this testimony, they had no ability to analyze the difficult situations presented. These situations sometimes reflected gender-based assumptions, assumptions which appeared to have affected the custody arrangements in question. More importantly, though, fathers and mothers who loved their children were being deprived of their company, usually to the detriment of everyone in the family, by courts lacking sufficient information about what is best for children.

- **The Remedies**

The advisory committee targeted education and research as its primary focus in this most difficult area of family law. The committee did not propose statutory reforms because finding solutions to these thorny problems was beyond the expertise of the advisory committee, and because proposals to change substantive law are beyond the usual purview of the Judicial Council. The advisory committee directed that the foregoing summary of the custody debate be provided as a tool for education and research.

4. SPECIAL PROBLEMS: CUSTODY AND CHILD SEXUAL ABUSE

FINDINGS

The seemingly irresolvable joint custody debate is far eclipsed by the dilemmas posed by allegations of child sexual abuse in dissolution proceedings. Such allegations evoke consternation and conflict among judges, lawyers, mediators, mental health professionals, and, most importantly, parents.

The advisory committee analyzed this issue and the testimony it received. The committee's review was not exhaustive, and the testimony received was selective. The committee did not view its charge as offering solutions to the difficult problems posed by this kind of custody litigation, but rather as examining the issue for traces of gender stereotyping and recommending ways to reduce the possibility of such stereotyping. The committee concluded that the current state of confusion and disagreement about these disputes creates an environment in which stereotypes about men and especially about women can readily influence decision-making.

⁶³ Los Angeles public hearing transcript, pp. 177–94.

⁶⁴ Los Angeles public hearing transcript, pp. 131–33, 172–74; Sacramento public hearing transcript, pp. 67–74.

The advisory committee found:

1. Allegations of child sexual abuse are sometimes made by mothers against fathers in child custody disputes. These allegations present difficult issues for judges to resolve.
2. The evidence tends to support the conclusion that instances of false allegations are not common, although they sometimes occur.
3. Appropriate explanations exist for the apparent tendency of allegations of child sexual abuse to surface for the first time in the context of a divorce.
4. Stereotypes and prejudices influence decision-making in this area of custody disputes. One striking example is the tendency to doubt the credibility of women who make these allegations, characterizing them as hysterical or vindictive—even when medical evidence corroborates a claim of child abuse.
5. There is an urgent need for speedy and expert resolution of these disputes, as well as for defined protocols for judges to follow in taking the steps necessary to reach a fair and just solution in the best interests of the allegedly molested child.

RECOMMENDATION 6

Request the Judicial Council to:

(a) Approve in principle and instruct staff and the appropriate committee to draft proposed legislation that would permit the family law judge and counsel in a case in which allegations of child abuse are raised to have confidential access to any existing investigatory reports submitted in the context of another proceeding outside the family law department, for example, by Child Protective Services, and to consider the need for ordering an expeditious investigation of the child abuse allegations if there are not adequate reports. The goal of all of the departments of the court should be to eliminate duplicative evaluations and to the extent possible limit the number to one court-ordered evaluation. The investigation ordered

must be conducted by a competent investigator who is well-trained in the area of child abuse, and shall be completed and submitted to the court as quickly as possible;

(b) Approve in principle and instruct staff and the appropriate committee to draft a Standard of Judicial Administration setting forth a model protocol for judges resolving custody disputes involving child abuse allegations including those involving child sexual abuse; and

(c) Mandate the inclusion of child abuse issues, including sexual abuse, and the model protocol in family law judicial education programs and other judicial education programs as appropriate.

DISCUSSION AND ANALYSIS

- **The Research on Child Sexual Abuse and Custody**

Custody disputes in which the mother alleges that the father has sexually abused a child of the marriage trigger the application of stereotypes by those called upon to participate in the custody decision. Some fathers assert, and some judges believe, that the allegations are usually false, made by hysterical or vindictive women seeking to gain financial or other advantage in a bitter custody dispute. Research in the field indicates that these stereotypes are not valid. The fact that the charge of malicious false allegations is routinely made emphasizes the lack of credibility our system affords women and children.

Although the advisory committee's review of the literature on child sexual abuse was not extensive, several researchers who have paid particular attention to the issue as it arises in custody disputes informed the committee's thinking. For example, Dr. Nancy Thoennes, who is the director of the Association of Family and Conciliation Courts Research Unit in Denver, Colorado, has participated with others in extensive research on child custody and mediation. Based on a two-year study in Colorado completed in 1988, Dr. Thoennes asserts:

- Allegations of child sexual abuse actually occur in only a small fraction of contested custody and visitation cases.
- The increase in the incidence of these allegations in custody and visitation disputes is probably due to increased reporting patterns and media attention to the issue.

- Custody disputes involving sexual abuse allegations are the most time-consuming and complex cases heard in the family law departments, a fact which may account for the impressionistic reports by court personnel that these cases are increasing.
- No evidence that the allegations are typically false was produced by the study.
- Child sexual abuse may be first disclosed after divorce because it may begin at that time due to the hostility of the "abandoned" spouse.
- The claim that mothers falsely and maliciously accuse fathers is based on a stereotype and is unwarranted.
- The study refutes the assertion that these custody disputes are "commonly motivated by a reporting parent who is vindictive or seriously impaired."⁶⁵

Another researcher corroborates some of these findings and states:

There are several reasons abused children may be more likely to disclose abuse by a parent and to be believed by the other parent following separation or divorce. With the breakup of the parents comes diminished opportunity for an abusing parent to enforce secrecy as there is increased opportunity for the child to disclose abuse separately to the other parent. Decreased dependency and increased distrust between parents increases willingness to suspect child abuse by the other parent.⁶⁶

Practicing attorneys support the researchers' conclusions. Sandra Joan Morris, a certified family law specialist and past vice-president of the American Academy of Matrimonial Lawyers, has had extensive experience trying custody disputes involving allegations of child sexual abuse by the mother against the father. In a published work, she emphasizes that the vast majority (86 percent) of allegations appear to be substantiated. She also contends that experienced evaluators are able to discern when allegations are false. She points out the element of bias underlying claims that the charges are false:

In the cases reviewed in this article, most of the husbands were professional people who were able to maintain facades of normalcy and logical thinking, although they did not test as being psychologically sound. This finding is consistent with the current studies.

Subsequent impulsivity and hostile behavior on the part of the father is often excused as being understandable given "what he is going through." The father's tenacity in fighting the case to the bitter end is matched by the

⁶⁵ Thoennes, *Child Sexual Abuse: Whom Should a Judge Believe? What Should a Judge Believe?* (summer 1988) 27 *Judges' Journal* 14–18, 48–49.

⁶⁶ Corwin et al., *Child Sexual Abuse and Custody Disputes* (March 1987) 2 *Journal of Interpersonal Violence* 91–102.

mother's tenacity in doing what she thinks is necessary to protect her child. Although either or both of them may be misguided, it is the mother who is almost universally blamed for the exhibition of this quality. As stated by one source, "it is much easier and more in accordance with our images of the world to regard a mother as crazy or hysterical than to recognize an otherwise seemingly rational and caring father as capable of the behaviors described."⁶⁷

Testimony presented to the advisory committee drawing from this research likewise corroborated the link between bias against women, who face an uphill battle to establish credibility in the courts, and the issue of false allegations of child sexual abuse. For example, Morris, in her testimony at the public hearings, emphasized the great lack of knowledge and study in the area of child sexual abuse, especially in the context of custody disputes. In general, she asserted that studies show (1) that children do not lie, or if they do, it is relatively easy to tell when they are lying; and (2) that not many allegations of child sexual abuse are false, and when they are, the falsehood is usually not deliberate. According to Morris, the failure to believe women who allege child sexual abuse arises from the myth that women are more emotional, hysterical, and vindictive, and results in the revictimization of the woman and the child. In one case in the witness's experience, the child was returned to the father and remolested. If possible, Morris believes that the child should testify.⁶⁸

Professor John Myers, an evidence expert and professor of law from McGeorge University, stated:

The fact that women make most of the allegations of child sexual abuse, and the evidence indicates that that is so, may raise important gender implications. Male judges may feel a personal sense of jeopardy when another male is accused of child sexual abuse.⁶⁹

Professor Myers suggests that the claim of false charges may be due in part to the "predilection on the part of some males to see women as hysterical or particularly vindictive and willing to stop at nothing when it comes to custody of children."⁷⁰ He points out that women are in a double bind: either they are not believed, or they are criticized for their failure to discover the abuse and protect the child. Professor Myers roots these views in historical treatises on evidence. In the testimony he presented to the advisory committee, he quotes "a very famous passage" from John Henry Wigmore, one of the foremost experts on evidence who was heavily influenced by Freud:

⁶⁷ Morris, *Sexually Abused Children of Divorce* (1989) 5 Journal of the American Academy of Matrimonial Lawyers 35, citing Waterman et al. (1986) *Sexual Abuse of Young Children*, p. 150.

⁶⁸ San Diego public hearing transcript, pp. 91–110.

⁶⁹ Fresno public hearing transcript, p. 130.

⁷⁰ *Id.*, p. 131.

Modern psychiatrists have amply studied the behavior of errant young girls and women coming before the courts in all sorts of cases. Their psychic complexes are multifarious, distorted partly by inherent defects, partly by diseased derangements or abnormal instincts, partly by bad social environments, and partly by temporary physiological or emotional conditions.

One form taken by these complexes is that of contriving false charges of sexual offenses against men. The unchaste mentality finds incidental but direct expression in the narration of imaginary sex incidents of which the narrator is either the heroine or the victim.

On the surface, the narration is straightforward and convincing. The real victim, however, too often in these cases is the innocent man. . . .

No judge should ever let a sex offense charge go to the jury unless the female complainant's social history and mental make-up have been examined and testified to by a qualified physician.⁷¹

The testimony of women who are themselves mothers of allegedly abused children or are friends or family members focused on (1) the lack of credibility afforded them and their children, (2) the conflicting orders from different departments of the courts, and (3) the lack of special training and expertise in this area.⁷² At the regional meetings, these views were echoed. Spokespersons for men accused of sexual abuse, while not in agreement that false allegations are rare, joined others in insisting upon the importance of obtaining trained experts and resolving the allegations as quickly as possible. One attorney who represented many fathers said:

We need an immediate process wherein if there is an allegation made, to get in and have our mental health professionals, our social workers get involved immediately and then be back to court in a matter of weeks, 20 days, back into court and intensely look into the allegations to help the courts make a determination of whether or not there should be some temporary restrictions between the parent and child.⁷³

California judges were also asked their views on allegations of child sexual abuse. The judges were posed the question, "How often do you hear allegations of child sexual abuse in the course of a dissolution proceeding," and were provided with the following responses: always, frequently, rarely, and never. Of the representative sample, 44.1 percent of the judges selected "frequently," and 50 percent selected "rarely." When these responses were broken down by gender, the survey indicated

⁷¹ *Id.*, pp. 126–27.

⁷² San Francisco public hearing transcript, pp. 162–67, 219–27; Fresno Public hearing transcript, pp. 157–67.

⁷³ Orange County regional meeting summary, p. 3.

that 68 percent of the female respondents answered "rarely" and only 32 percent answered "frequently" as compared to 43.3 percent of the male judges who answered "rarely" and 52.5 percent who answered "frequently."⁷⁴ Clearly, male judges appear to perceive a larger number in claims of sexual abuse.

The survey then asked the judges to relate how frequently the allegations of child sexual abuse are true. Again, the choices were: always, frequently, rarely, and never. Of the representative sample, 34.6 percent said that the allegations were frequently true, and 61.5 percent said that the allegations were rarely true. Note, however, that 58.8 percent of the women judges who responded said that the allegations were "frequently" true and 35.3 percent of the women said that the allegations were "rarely" true.⁷⁵

These responses to the survey indicate that there is a vast disparity in judicial opinion about whether false allegations are made; and within this disparity, there are significant gender differences. Women judges tend to believe the truth of the allegations much more readily than men judges do.

- **The Remedies**

False allegations of child sexual abuse are sometimes made by vindictive women in the course of a dissolution proceeding. There is no evidence, however, that false allegations are as common as some judges seem to think. Indeed, some commentators, as discussed above, believe that false allegations rarely occur.

The advisory committee's inquiry makes clear that different standards prevail regarding how to resolve allegations of child sexual abuse. Delays occur that jeopardize children and parents alike. Different branches of the court become involved, which subjects the child to continuing and extensive questioning and which may cause inconsistent results.

The key to resolving these cases lies in providing courts with good expert evaluations. Dr. Nancy Thoennes makes the following laudable suggestions:

- The value of an evaluation report is a function of the expertise of the professional who prepares the report. Some professionals have well-known biases that should be questioned by judges.

⁷⁴ Judges' Survey, question 33a; see also Judges' Survey Appendix, pt. A, p. 257 (cross tabulations, probability sample, and gender) (on file at the AOC).

⁷⁵ Judges' Survey, question 33b; Appendix, pt. A, p. 259.

- The evaluator's credentials should include a demonstrated experience with family dynamics in sexual abuse, common characteristics of sexual abuse victims and offenders, and child adjustment to divorce.
- Every member of the family and extended family should be seen, and more than one interview of each person should be conducted.
- The evaluation should be court-ordered, and multiple evaluations should be avoided.
- The evaluator should consider not just the sexual abuse charge, but all aspects of the family so that mistakes are not made regarding symptoms that might be explained in other ways.
- Issues to be explored in the interviews should be extensive and should follow a set protocol.
- Psychological testing should be ordered using a combination of standardized tests.
- Evaluators should contact all other professionals who have seen the family on prior occasions.
- The evaluation should be a result of cooperation between the different departments of the court that may be concerned with the allegation of sexual abuse.⁷⁶

Accordingly the advisory committee proposed that a rule be adopted that will allow family law judges access to court-ordered investigations and to the evaluations and investigations of other departments within the court. The ultimate goal should be that only *one* professional, court-ordered evaluation be conducted. In addition, a model protocol for handling a custody dispute involving child sexual abuse allegations should be developed to serve as a guideline for all courts, and should be included in the Standards of Administration. Appropriate judicial education programs should then focus on the model procedures.

5. DIVISION OF MARITAL ASSETS

FINDINGS

The division of assets in a dissolution proceeding was not a major focus of the advisory committee's inquiry. Nevertheless, some testimony on the issue was received, and the advisory committee found some evidence that:

1. The division of assets upon dissolution may be influenced by gender stereotypes.

⁷⁶ Thoennes, *supra*, pp. 18, 48.

2. Simplified procedures that can be invoked by lay people should be created to implement existing law allowing accounting of marital assets during or prior to dissolution.

RECOMMENDATION 7

Request the Judicial Council to instruct the Advisory Committee on Legal Forms to (a) develop a simple petition form that would permit a spouse to request an accounting of the marital assets as now provided in Civil Code section 5125.1; and (b) amend the dissolution petition to add a provision requesting an accounting of marital assets.

DISCUSSION AND ANALYSIS

Although the issue of division of marital property was not emphasized by the regional meeting and public hearing participants, some attorneys did comment on the ways in which gender stereotypes influence the division of property. One Nevada County attorney said:

There is kind of in this county a definite feeling that male things went to the men, and . . . female things went to the woman. And . . . if there was a pickup, we knew it was going to go to the guy We [had a case] where the pickup was really an issue because she ran a janitorial service. She needed the pickup to work. We thought maybe this time he [the judge] is going to say that she should get it. She didn't get it. He got it, even though it was her livelihood.⁷⁷

In the more affluent neighborhoods of Los Angeles, the issue is present, albeit in a different form. As one attorney told the advisory committee members: "I have had a female judge say, well, the man's going to get the Mercedes because he has to go out and start dating."⁷⁸ Perhaps the conclusion here is whether we are talking about pickups or Mercedes, male or female judges, men and their cars cannot be separated.

Other testimony on the division of marital assets described the stereotype that women cannot handle money. Men are typically awarded the business or growth assets. This testimony was corroborated in the family law focus groups in September 1988 at the State Bar Annual Meeting.

A second theme in the testimony on marital property was the need to properly implement existing law that permits one spouse to petition the court for an accounting

⁷⁷ Butte County regional meeting summary, p. 8.

⁷⁸ Los Angeles regional meeting transcript, p. 43.

of the marital assets.⁷⁹ Dorothy Jonas testified about legislation designed to assist spouses in exercising their right of joint management and control over the community property by requiring disclosure. She asserted that the law has been ineffective because it is too expensive to hire a lawyer to force disclosure. A simple form is needed to enable a spouse to acquire the information without the assistance of counsel, or at least to reduce the cost of such assistance.

The advisory committee believed that the key to appropriate division of assets upon divorce may, in fact, be a strengthening of the right of disclosure during marriage. At Jonas' suggestion, the committee recommended that a simple form be adopted to expedite the exercise of this right and reduce potential litigation on this issue. Legislation creating a fiduciary duty between spouses similar to that which exists between business partners should also protect against overreaching in the division of marital assets.⁸⁰

B. IMPEDIMENTS TO THE NEUTRAL PARTICIPATION IN FAMILY LAW PROCEEDINGS FOR JUDGES, LAWYERS, AND MEDIATORS

1. JUDGES

FINDINGS

The family law assignment in the superior court is one of the least desirable and most burdensome of all available judicial assignments. This is especially true for proceedings seeking temporary orders of support, custody, or visitation.

Many family law cases seem insoluble, and the time afforded to resolve them is negligible considering the seriousness and difficulty of the issues. The situation is exacerbated by the potential for bias in decision-making in this field of law, the lack of mandatory judicial education for family law judges, and the tendency to select for the assignment newly appointed judges who are often reluctant to serve and who lack training and background in family law.

In the course of examining judicial assignments to family law, the advisory committee found that:

1. Stereotypes about men, women, and divorce inevitably arise in family law proceedings.

⁷⁹ See Fam. Code, § 1101; formerly Civ. Code, § 5125.1.

⁸⁰ See Fam. Code, §§ 1100–01; formerly Civ. Code, §§ 5125–5125.1.

2. Judges rate the family law assignment as their lowest preference by a wide margin.
3. Working conditions for family law judges are substandard. Time constraints, inadequate staffing, and pressure to move calendars augment the stress inherent in hearing matters of great emotional import to the parties. These conditions result in burn-out among family law judges, especially among those who hear requests for temporary support, visitation, and custody.
4. The inadequacy of the working conditions and the unpopularity of the assignment may both be due to relegating "women's and children's issues" to the lowest priority.
5. More attorneys with demonstrated expertise in family law should be appointed to the bench.
6. In many counties, there is no gender diversity among judges hearing family law matters, either because no female superior court judge has been appointed or elected in the county or because no female superior court judge has been assigned to a family law department.

RECOMMENDATION 8

Request that the Judicial Council refer to the Advisory Committee on Family Law the task of examining the working conditions and educational needs of family law judges and submitting recommendations for ways in which the family law assignment might be enhanced.

DISCUSSION AND ANALYSIS

- **The Effects of Societal Bias on Family Law Judges**

Examples of the ways in which stereotypes about women and men permeate judicial decision-making are found throughout this report. They are important to emphasize here, however, because, in the advisory committee's view, bias in decision-making occurs primarily because it reflects the bias of the larger society. Without education designed to contradict the stereotypes upon which we often rely and without sufficient time to make reasoned, objective decisions reflecting that education, bias in decision-making is more likely to occur. As Justice King stated:

There is bias. There is bias everywhere, and it's certainly present in the court system. It's present in the family law court system. If it's not present in the judges, it's often present in the parties themselves. And it's understandable, we all grow up with likes, and dislikes, and preferences, and some of them. . . I suppose are instinctive, some of them we can blame on our parents having given to us, and some of them we've had the pleasure of developing ourselves.

In my experience, most judges, once they go on the bench, do try to put these aside. I think the first step to doing that partly is a result of judicial education, and partly, I suppose, a result of consciousness raising, is to recognize what they are, and to recognize that we all possess them and deal with it.⁸¹

- **Family Law: Assignment to Siberia**

The task of the family law judge is to avoid bias in decision-making under the most stressful possible circumstances and without appropriate resources. Further, decision-making in family law is by its very nature conducive to reliance on bias or stereotypes: there is wide discretion, little time, and limited opportunity for appeal. Judges who presented information to the advisory committee pointed to the following factors as contributing to the adverse conditions for family law judges, and hence to creating a climate where bias is likely to affect decision-making:

- In family law, there is "an emotional level that is unequaled in any other kind of case. . . ." ⁸²
- Family law departments are inadequately staffed. ⁸³
- The family law judge is often the newest judge on the court and usually has little or no experience in family law. ⁸⁴

Ventura Superior Court Judge Steven Z. Perren eloquently described his experiences as a judge assigned to a family law department for one year. He said: "[D]ay in and day out, I had anywhere from 30 to 50 settings a day for trials on OSC, plus anywhere from 5 to 15 walk-in ex parte applications, and that's one judge. You're not going to do a great job, be you Solomon or Perren under . . . that kind of a setting."⁸⁵ Judge Perren stressed the need to afford the judge more time, the seriousness of the issues to be decided, the unpopularity of the assignment choice because of these issues, and the fact that many parties appear in court without representation.⁸⁶

⁸¹ San Francisco public hearing transcript, p. 173.

⁸² San Francisco public hearing transcript, p. 174.

⁸³ *Id.*, p. 175.

⁸⁴ *Id.*, p. 177.

⁸⁵ Fresno public hearing transcript, p.111.

⁸⁶ *Id.*, pp. 106–15.

It comes as no surprise that family law was selected, by a wide margin, as the least favored area of assignment by judges who responded to the Judges' Survey. Judges were asked the following question: "If you were free to choose your judicial assignment, which type of assignment would you choose?" They were asked to respond to this question by ranking in order of preference the fields of criminal, civil, juvenile, and family law by selecting 1 (most preferred assignment), 2, 3, or 4. The results of this question are listed in the table below for the entire sample of responses, broken down both by gender and by family law and nonfamily law judges.

	Male	Female	F. Law	Non-F. Law
Criminal	1.7	1.6	2.3	1.5
Civil	1.8	1.8	1.8	1.8
Juvenile	2.9	2.7	3.1	2.6
Family	3.0	2.8	2.5	3.3

As the table demonstrates, family law was selected at the very bottom of the list by every category of judge, except for existing family law judges. *Even family law judges selected family law as their third preference.* The table clearly displays a uniform preference among judges for criminal law assignments and a uniform distaste for family law. Ironically, discussions with judges and practitioners in Los Angeles revealed that, in some branches of the court, judges compete for the family law assignments. This represents a change from the past, motivated at least in part by the possibility of early retirement and subsequent service as private judges in family law matters. This phenomenon is increasing as the use of private judges in family law matters involving large sums of money also increases.⁸⁷

Attorneys reported to the committee that judges in family law are sometimes untrained and uninterested; and those who are not often work under abusive conditions. One certified family law specialist, who was then the current chair of the family law section of the county bar association, and who, as the chair of the section's rules committee, had worked closely with judges for the preceding four years, testified at the Sacramento Public Hearing. She said: "Family law judges work themselves to death if they're good judges. And if they're good judges, they try very hard to do their very best in making decisions they're often not prepared for at all."⁸⁸ She called for the

⁸⁷ Los Angeles public hearing on private judges (October 1989), pp. 446–47 (on file at the AOC).

⁸⁸ Sacramento public hearing transcript, p. 150.

immediate appointment of more family lawyers to the bench. In describing the qualities of a good family law judge, she said:

I think a good family law judge is a judge who comes into a family law assignment with a positive attitude. Who does not look at this as being sent to Siberia. Who is willing to keep an open mind, who understands that just like all the rest of us as human beings, he or she has biases and prejudices, but is willing to be open enough to work very hard to put those aside. Who is willing to listen and to learn from the people who know.⁸⁹

Attorneys appear to recognize as well that the selection process for family law judges may be one factor that contributes to the lack of interest and training. Moreover, the unpopularity of the family law assignment has been linked to gender issues. For example, another Sacramento family law attorney stated:

We get the new judges. . . because no one wants to do the family law. . . . It is the highest volume. It is the most emotionally draining, and again, normally, . . . you either get it because you're the new judge, or you annoyed someone, and they've sent you back down to family law as a punishment, or . . . in some of the smaller counties around Sacramento where there are only two or three judges, it's by the toss of the coin, and it's the loser who sits for that year in family law.

[The] attitude [is] that family law is somehow a woman's issue, and that attorneys and judges who practice in family law have not hit the big time yet. I think that this is one of the main reasons that we have difficulty in family law.⁹⁰

Attorneys noted the need for the appointment of more family lawyers and more women to the bench. For example, one certified specialist who testified at the Orange County Regional Meeting noted the different experiences of men and women and how these differences can influence custody results. She said: "I think as long as men and women have different perspectives which they probably always will, we have to have women judges. Half of all people getting divorced are women. Half of them are women, but are half the judges women? So we just need a balanced perspective I believe."⁹¹

• The Remedies

The advisory committee discussed possible remedies for the adverse conditions commonly experienced by family law judges and the general unpopularity of the

⁸⁹ *Id.*, pp. 153–54.

⁹⁰ *Id.*, pp. 160–61.

⁹¹ Orange County Regional meeting summary, p. 7.

assignment at the focus groups on family law conducted at the State Bar Annual Meeting in 1988. Steven Adams, a noted expert and educator in family law, presented his view that the family law assignment must be enhanced in some manner. He suggested increased staffing, appointment of additional judges, enhanced judicial education, and consideration of sabbaticals. He also proposed giving family law judges exit interviews as they leave the assignment. Possible questions might include: Why were you willing to be assigned to family law, why did you leave, and what suggestions do you have for improvement?

The State Bar focus group participants cited the following as possible reasons for judicial antipathy toward family law: judges feel they become too personally involved in the proceeding; they find it unpleasant, too personal, too fraught with bickering; and they may incorporate a general societal bias that accords more importance to issues of property and money than to issues affecting people. Although these problems may not be caused by gender bias, they may be producing gender bias in many cases.

Based on the information received through the various means described in this section, the advisory committee determined that the Judicial Council may wish to consider possible ways to enhance the family law assignment to ameliorate underlying conditions that create the potential for bias. The committee members believed that the appropriate body to make these recommendations would be the Judicial Council Family Law Advisory Committee, whose members are all specialists, both lawyers and judges, in family law. The committee also noted that the need for the appointment of more women to the bench is crucial to ensuring fairness. The committee members further recognized that, in light of the high volume and difficulty of the proceedings, more attorneys with family law expertise should be appointed to the bench. While understanding that the Judicial Council cannot appropriately influence the appointment of judges, the committee nevertheless wished to emphasize these points in its report without submitting a recommendation relating to judicial appointments.

2. LAWYERS

FINDINGS

Based on its findings concerning judges and the discussions about attorney bias at the focus group for family lawyers in September 1988, the advisory committee favored early training for all lawyers on issues of gender bias in family law. Such training ensures that not only lawyers, but also those who are ultimately appointed to the bench, will be knowledgeable about family law and therefore more likely to overcome stereotypic notions of the roles of women and men. Family law training will benefit the public and prospective clients by rendering attorneys more sensitive to these issues.

The committee also considered impediments that may exist for family law attorneys to represent their clients fairly and vigorously. Two serious impediments, insufficient awards of attorney's fees and the inadequate representation for indigent parties, will be considered later in this chapter. Another significant barrier appears to be the growing practice of mandating that motions for temporary support, visitation, and custody be submitted to the court on declarations, without taking testimony. This practice, designed to reduce court time and commonly enforced in at least one county, prevents counsel from examining the parties and may ultimately result in unfairness.

Accordingly, the advisory committee found that:

1. To ensure that informed attorneys, and ultimately informed judges, engage in their profession without bias, major steps should be taken to provide for adequate training in family law that includes educating law students and lawyers on gender bias issues.
2. The refusal without exception to permit the taking of live testimony at a hearing for temporary support, visitation, or custody may seriously impede counsel's ability to ensure fairness for his or her client.

RECOMMENDATION 9

Request the Judicial Council to:

- (a) Commend the advisory committee's report to the State Bar and the Committee on Bar Examiners and urge consideration of including family law on the State Bar exam;**
- (b) Urge further that education on gender bias issues in family law be required for certification as a family law specialist; and**
- (c) Commend the report to all law school deans and urge that gender bias issues in family law be incorporated into the law school curriculum.**

RECOMMENDATION 10

Request the Judicial Council to refer to the Family Law Advisory Committee the issue of precluding without

exception the taking of live testimony at hearings for temporary support, visitation, or custody.

DISCUSSION AND ANALYSIS

- **Legal Education**

Most law schools now offer family law courses. These courses, however, are ordinarily not required and do not necessarily cover the issues of gender bias that are the subject of this report. In the advisory committee's view, gender bias is a societal problem, and all education and training of lawyers and prospective judges should include gender bias in family law. As discussed in the chapter of this report devoted to courtroom demeanor and civil litigation, a judge's behavior reflects the norms and customs not only of the society but also of the legal culture. If, from the beginning of their acquaintance with the legal world, law students are sensitized to the issues of bias endemic in family law, the task of changing judicial conduct and decision-making will be made easier.

Improved legal education on gender bias in family law is crucial, not only to train future judges, but also to ensure fairness among family law attorneys. At the State Bar focus group for family lawyers, attorneys admitted that, in the press of business the behavior of some attorneys toward their clients might reflect gender bias. Such bias is especially prevalent when a client is needy, upset, or perhaps uncooperative, and when the attorney's fees are low. In any event, there is no question that a greater understanding of the underlying issues confronting women in divorce will improve an attorney's ability to represent his or her client.

Professor Herma Hill Kay, then professor and now dean at Boalt Hall School of law, a past president of the Association of American Law Schools, and a family law scholar, offered valuable testimony on gender bias in legal education at the hearings. In the course of discussing tenure issues for women faculty members, Dean Kay decried the absence of law school courses and legal scholarship that directly relates to women's experience. Her remarks are equally applicable to the woman law student:

And I have to say that I do think that we have experienced a phenomenon in legal education, as in other areas of university scholarship, where young women have come into a field, they have seen first that the areas that interested them were not dealt with. They have felt that new methodology needed to be created to deal with those issues that they perceived, and they have formulated and created a new kind of scholarship. In legal education, we know it as feminist jurisprudence.⁹²

⁹² San Francisco public hearing transcript, p. 61.

The advisory committee's concern about legal education in family law is echoed nationally. As noted in a *New York Times* article, law schools in the United States are paying more attention to family law due to the increased number of women in the work force and changes in the nature of family relationships. For example, one professor assigns behavioral research on bonding between mothers and children as part of a course on child custody. One New York family law expert concluded: "Even if the lawyers never handle an adoption case, a divorce or any other family law matter during their careers, I believe they will be better lawyers for having completed these courses because what family law does is to show lawyers the tremendous impact that the law has on people's lives."⁹³

The advisory committee therefore recommended that law schools include in their curricula courses on family law and especially on gender bias in family law. These issues should also be tested on the bar exam, and made one of the certification requirements for family law specialists.

- **Reliance on Declarations in Hearings for Temporary Orders**

Patsy Ostroy, past chair of the Conference of Delegates to the State Bar, reported that, in the Central District of the Los Angeles Superior Court, a rule has been proposed requiring submission of declarations in place of live testimony to resolve issues of temporary support, visitation, and custody. Ostroy objected to this incursion on the adversary system of this truth-finding mechanism.⁹⁴ The advisory committee recognized that reliance on declarations may indeed save court time and obviate the need for time-consuming hearings to establish generally incontrovertible facts. The committee believed, however, that such a rule should not be rigidly and uniformly enforced. If, for example, serious allegations of child abuse or spousal abuse are at issue, live testimony may be necessary to ensure fairness to both parties. As Ventura Superior Court Judge Steven Z. Perren described decisions he made when the parties were not before the court: "Number one, you typically deal with the cold word . . . in that you are receiving something by way of declaration as opposed to a human being who is testifying. Moreover, that cold word . . . is probably as much the result of the draftsmanship of counsel as it is the reality of the situation."⁹⁵

Accordingly, the committee suggests that the collective expertise of the Judicial Council's Family Law Advisory Committee be applied to this issue. An examination of the prevalence of this practice and its nature and extent should be conducted, with a goal

⁹³ Johnson, *New Law School Courses Stress Family* (July 13, 1987) *The New York Times*, p. B7.

⁹⁴ Los Angeles public hearing transcript, pp. 280–81.

⁹⁵ Fresno public hearing transcript, p. 108.

of preserving legitimate exceptions for cases that require live testimony to ensure fairness.

3. MEDIATORS

FINDINGS

An analysis of gender bias in California's system of mandatory mediation of family law disputes over visitation and custody was a complex and demanding task for the advisory committee. On the one hand, judges, lawyers, mediators, and other experts stoutly defend the mediation system in California, arguing that it has allowed courts to resolve disputes more expeditiously and with the benefit, knowledge, and assistance of mental health professionals. Moreover, mediators emphasize that clients are satisfied with mediation as a way of resolving custody and visitation disputes.

The advisory committee was also impressed with mandatory mediation's critics, who point to serious problems inherent in the process. These problems include the often unequal bargaining positions of the parties, the lack of public accountability, the coercive nature of mediation when settlement is the only goal, and the fact that biases of all kinds, including gender bias, are just as likely to be manifested by mediators as they are by judges. The critics emphasize as well that the party who usually possesses the least bargaining power and is most easily coerced is often the woman.

The advisory committee struggled with these seemingly dichotomous views. The committee recognized, however, that mandatory mediation in California is here to stay—at least for the foreseeable future—and that mediation is overwhelmingly supported by those who supervise and participate in it. To suggest that mediation be made voluntary has the potential of crippling a severely burdened court system. When family law judges already report that they have insufficient time to handle grueling calendars, a suggestion that would increase that caseload by a large margin is untenable.

The advisory committee concluded that the quid pro quo for retaining mandatory mediation must be creating safeguards to protect against potential problem areas. Discussing and proposing these safeguards and challenging the family law legal community to develop new ideas and remedies is the primary purpose of this section of the report.

With respect to mediation, the advisory committee found:

1. The level of qualifications and training of mediators throughout the state is not uniform and needs improvement.

2. Professional standards for mediators should be promulgated that include an ethical duty to avoid bias in all aspects of the mediation process.
3. Dangers inherent in uniform mandatory mediation of custody and visitation disputes include:
 - the possibility that one party will be coerced into agreement due to unequal bargaining power or acculturation that seeks to "please the mediator";
 - the pressure to resolve the dispute and serve the court's goal of avoiding litigation may result in inappropriate or unfair agreements in some cases;
 - Reflecting the bias of the larger society in which they perform their tasks, mediators are just as prone to exhibit biases, including gender bias, as are the other participants in the process; and
 - the fact that mediation occurs in private and, as a practical matter, is not often subject to court review renders the accountability of the process questionable.
4. Public perception of the fairness of mediation is vitally important to the court system. Therefore, public grievance procedures for complaints of bias or prejudice against mediators should be instituted.

RECOMMENDATION 11

Request the Judicial Council to:

(a) Instruct the Family Court Services Program to (1) include the issues of gender bias outlined in this section of the report with respect to gender stereotypes and the relative power balance between the parties in its mediator training programs; and (2) include an ethical duty to refrain from exhibiting gender bias or other bias in the course of a mediation in the standards of practice for court connected child custody mediation now under consideration by the Judicial Council;

(b) Approve in principle and instruct staff and the appropriate committee to draft a Rule of court that provides that to the extent recommendations are made to bench officers by mediators, the recommendations must be in writing with the reasons for the recommendations stated

on a standard form developed for the purpose, and copies of the report and recommendation are to be made available to the parties by the court. The rule should further provide that to the extent a bench officer relies on the recommendations contained in the mediator's report in making orders, the basis of the bench officer's determination is to be stated in the minutes or on the record unless otherwise waived by the parties;

(c) Refer jointly to the Family Law Advisory Committee and the Family Court Services Program the task of studying the custody evaluation process in California and request the submission of recommendations promoting improvement of the qualifications and professional standards of evaluators;

(d) Approve in principle and instruct staff and the appropriate committee to draft a Rule of court that would require that the parties to a mediation be informed at the initiation of the process what the process will entail and how the information obtained by the mediator will be used pursuant to proposed statewide mediation standards to be submitted to the Judicial Council;

(e) Approve in principle and instruct staff and the appropriate committee to draft a Rule of court that would create a simple grievance procedure for family law litigants who participate in mediation and that would vest oversight responsibilities in the presiding judge. The proposed rule should include a requirement that family law litigants be informed of the right to submit a complaint regarding the conduct of a mediator; and

(f) Seek adequate funding to accomplish the goals set forth in this recommendation.

DISCUSSION AND ANALYSIS

- **Introduction**

At the time this report was first issued, California was one of three states⁹⁶ with statewide provisions compelling mediation of custody and visitation disputes in family law cases. In California, the law provides:

In a proceeding where the custody of, or visitation with, a minor child is at issue (including, but not limited to, a proceeding where a temporary custody order is sought), and it appears on the face of the petition or other application for an order or modification of an order for the custody or visitation of the child that either or both these issues are contested, the matter shall be set for mediation of the contested issues before or concurrent with the setting of the matter for hearing. . . . The purpose of the mediation proceeding is to reduce acrimony which may exist between the parties and to develop an agreement assuring the child such close and continuing contact with both parents as is in the best interest of the child. The mediator shall use best efforts to effect a settlement of the custody or visitation dispute that is in the best interests of the child, consistent with the considerations required by section 3022.⁹⁷

Statewide statistics reveal that, of the 171,120 dissolution petitions filed in fiscal year 1988–89, 94,934 were disposed of before trial, 44,111 uncontested matters were disposed of after trial, and only 9,855 contested matters, or approximately 5.8 percent of the total filings, were actually tried.⁹⁸ Although many of the contested cases resolved before trial were disposed of by the parties themselves or with the assistance of attorneys, a major portion were resolved in the context of court-ordered mediation. Thus, mediation has a major impact on California's divorcing families.

- **Mediation: The Good News**

The advisory committee was persuaded by the information it gathered that both judges who supervise and mediators who conduct the mediation process believe in its effectiveness. For example, Hugh McIsaac, former Director of Family Court Services for the Los Angeles Superior Court, testified at the public hearing. As he explained, Los Angeles has by far the largest family court docket of any other county in California. In

⁹⁶ The other two states are Maine and Delaware. See Del. Fam. Ct. CR (16)(a)(1) and Me. Rev. Stat Ann. Tit. 19, § 752 (but allowing exception "upon motion supported by affidavit . . . for extraordinary cause shown . . .").

⁹⁷ Fam. Law Code, §§ 3170 and 3172 formerly Civ. Code, § 4607(a), repealed Stats. 1992, ch. 162, § 3 (Assem. Bill No. 2650); eff. Jan. 1, 1994.

⁹⁸ See Judicial Council of California, *Annual Data Reference*, 1988–89 Caseload Data by Individual Courts, table 3, p. 13.

Los Angeles, 42,035 petitions were filed in 1988–89, 32,920 were disposed of prior to trial, 8,373 uncontested matters were disposed of after trial, and 1,917 contested matters were tried.⁹⁹ McIsaac pointed out the following virtues of California's mandatory mediation system:

- Mediation teaches a conflict-resolution process that most parties will need in their future dealings with each other.
- It provides parents with a way to avoid the adversary system in resolving disputes about their parental roles.
- Mediation promotes coordination between attorneys, judges, and mental health professionals, who work together to "find sensible solutions for these families at a very difficult moment in their lives."
- It focuses on the needs of the parties rather than their extreme positions.
- Mediation creates options other than winning or losing and promotes creative compromise.¹⁰⁰

In January 1992, the Statewide Office of Family Court Services issued California's first statewide study of mediation, using "statewide representative data [to] . . . provid[e] uniform statewide statistics for court-connected mandatory mediation programs."¹⁰¹ This study, known as the *Snapshot Study*, confirms much of McIsaac's testimony before the advisory committee. The study found overwhelming client satisfaction with mediation. Significantly:

- Ninety percent of all clients said that mediation was a good way to come up with a parenting plan;
- Ninety-three percent of clients reported that mediation procedures had been described to them clearly;
- Eighty-five percent of parents reported that they did not feel intimidated and freely said what they really felt; and
- Eighty-six percent said that they felt no pressure to go along with things they did not want.¹⁰²

The Statewide Office of Family Court Services is conducting continuing research on mediation and expects to issue reports that provide more detail on good and bad mediation outcomes, as well as other services provided to families, in connection with mediation.

⁹⁹ *Id.*

¹⁰⁰ Los Angeles public hearing transcript, pp. 138–40.

¹⁰¹ *California Statewide Snapshot Study of Family Court Services* (1992), p. i [hereinafter "Snapshot Study"] Statewide Office of Family Court Services (on file at the AOC).

¹⁰² *Id.*, p. iii–iv; see also *id.*, p. 14–17.

National research on the advantages of mediation has also been conducted. Dr. Jessica Pearson and Dr. Nancy Thoennes conducted a longitudinal evaluation of mediating and litigating custody disputes. In general, they found that on average 60 percent of the clients in the study reached agreement through mediation, that a majority of mediation clients were satisfied with the process, that soon after mediation compliance was high, that successful mediation improved the relationship between the former spouses, that mediation resulted in more joint custody arrangements than nonmediated disputes, and that successful mediation participants progressed through the system at a faster rate. While generally supporting the use of mediation, the researchers expressed concern about the likelihood of its success with uncooperative or otherwise uncompromising parents, and noted the ongoing question of the effect of joint custody on parents and children.¹⁰³

California judges who have heard family law matters at some time during the preceding three years overwhelmingly support mediation. On the Judges' Survey, respondents were asked the following questions: "Do you think that the qualifications of the mediators in your court are adequate?" The answer "yes" was selected by 96.6 percent of the judges. When the sample that included an oversample for women judges is analyzed, an interesting gender difference emerges. Of the women respondents 89.5 percent answered "yes" and 98.4 of the men made that selection.¹⁰⁴ Thus, California judges with immediate experience in family law support the mediation system resoundingly and believe that mediators are qualified.

- **Suggestions for Improvement**

Mandatory mediation was instituted in California after little empirical evaluation of its effects on women and children. Mediation was chosen in order to reduce court time and to refer messy custody and visitation litigation to mental health professionals.

At least one family law scholar, Professor Martha Fineman of the University of Wisconsin Law School, has severely criticized the biases and value judgments of these mental health professionals. Professor Fineman asserts that mental health experts serving as divorce mediators are not in fact neutral parties. To the contrary. "They have an institutional and professional bias for certain procedural and substantive results that promote their own interests and that will produce changes designed to enhance and ensure their continued centrality in custody decision-making."¹⁰⁵ She also perceives mediators' biases about custody arrangements as essentially detrimental to women:

¹⁰³ Pearson and Thoennes, *Mediating and Litigating Custody Disputes: A Longitudinal Evaluation* (1984) 17 Family Law Quarterly 497, 504–08, 516–17.

¹⁰⁴ Judges' Survey, question 31. See Appendix, pt. A, *supra*, p. 247.

¹⁰⁵ Fineman, *Dominant Discourse, Professional Language, and Legal Change in Child Custody Decision-Making* (1988) 101 Harv.L.Rev. 727, 761.

Joint custody can be a disaster if parents are unwilling or unable to cooperate. Such an arrangement may give a man continued control over his children (and through the children, control over his ex-wife's life), yet not result in increased assumption of responsibility on his part. Anecdotal evidence indicates that many women view joint custody as 'losing' -- whereas many men view it as 'winning' -- the divorce wars; as a result, many women bargain away needed property and support benefits to avoid the risk of 'losing' their children. The negative implications of the shift to a therapeutic model and mediation remain largely unexplored.¹⁰⁶

Professor Carol S. Bruch of Martin Luther King, Jr., Law School at the University of California at Davis is concerned with the issue of fairness in mediation. She writes:

The substantive fairness of divorce mediation depends on the mediator's impartiality and on the ability of divorcing parties to effectively express and represent their own interests without the assistance of counsel but with the aid of a mediator. Although concerns for impartiality and adequate representation also arise in judicial proceedings, the matter is far more pressing in mediation because *the process occurs in private, without the presence of attorneys or court reporters, and without access to appellate review. Even a skilled mediator cannot compensate for the sharp disparities in power and sophistication that often exist between divorcing spouses.*¹⁰⁷ (Emphasis added.)

Another researcher, who considers mediation imperfect but nonetheless better than the courts, points out the following flaws: (1) mediation is conducive to "emotional intimidation, asset-hiding, and the exertion of financial leverage"; (2) mediator recommendations are rubber-stamped, which creates concerns about due process and accountability; and (3) mediation is difficult for the more passive of the parties,¹⁰⁸ who is often female.

In a significant and provocative article written since the issuance of this report in draft, Professor Trina Grillo of the University of San Francisco has eloquently described mediation's failings for women.¹⁰⁹ A mediator herself, Professor Grillo concludes that:

¹⁰⁶ *Id.*

¹⁰⁷ Bruch, *And How Are the Children? The Effects of Ideology and Mediation on Child Custody Law and Children's Well-Being in the United States* (1988) 2 Int'l Journal of Law and the Family 106, 120.

¹⁰⁸ Erlanger et al., *Participation and Flexibility in Informal Processes: Cautions From the Divorce Context* (1987) 21 Law & Society Review 585, 597-602.

¹⁰⁹ Grillo, *The Mediation Alternative: Process Dangers for Women* (1991) 100 Yale L.J. 1545.

Mediation poses such substantial dangers and provides so few benefits to unwilling female participants, . . . that to my mind it is indefensible to require mediation¹¹⁰

Among the damages of mediation for women that this scholarly and wide-ranging article catalogues are: its overemphasis on compromise without recognizing fault, context, or the parties' past dealings with each other; its de-emphasis on assertion of rights and expression of anger, which is especially devastating to women of color; and its stress on women attaining economic independence without a realistic appreciation of women's unequal earning power.¹¹¹ Professor Grillo also shares previous commentators' concerns that mediators' recommendations are too often "rubber-stamped" by courts and too often steer the parties toward joint custody; that mediation is especially troubling in cases involving domestic violence; and that mediators are not immune to gender bias.¹¹²

¹¹⁰ *Id.*, p. 1583.

¹¹¹ *Id.*, pp. 1563–64, 1567, 1569, 1576–79.

¹¹² *Id.*, pp. 1555, 1584–90, 1594–96. Indeed, with respect to this last point, Prof. Grillo argues that mediators' biases are even more dangerous than judges', both because "there are numerous restrictions on the way the decision-maker ordinarily relates to parties in the adversarial setting that simply do not apply to mediation." (*Id.*, p. 1589) and because prejudice is more likely to flourish "in intimate, as opposed to formal or public settings." (*Id.*, p. 1590). For the reasons stated in the text, the advisory committee rejected the central thesis of Prof. Grillo's article: that mediation should be voluntary and not mandatory. However, her criticisms of the system are thoughtful and thought-provoking, as are her suggestions for reform. Rather than mandatory mediation, Prof. Grillo argues for an improved adversary system:

"The adversary system admittedly works poorly for child custody cases in many respects. There are, however, some ways to avoid damaging custody battles under an adversary system, such as enacting presumptions that make outcomes reasonably clear in advance, court-sponsored lectures on settlement, and joint negotiation sessions with lawyers and clients present. When in court, lawyers could be held to higher standards with respect to communicating with their clients, and judges could refrain from speaking to lawyers when their clients are not present. (It is difficult to imagine how a client can know whether to trust his or her lawyer when significant parts of the proceedings take place out of earshot.)" *Id.*, p. 1609. She further argues for reform of mediation, when it is used:

"Any reform proposals, of the adversarial system or of a mediation alternative, should be rejected if they result in further disempowerment of the disempowered. Reform must operate on two simultaneous levels: first, by changing the institutions and rules that govern custody mediation, and second, by encouraging the respect of each mediator for the struggles and lives of the individuals involved in mediation. Any reforms should evince a concern for the personhood of the mediation clients, a concern that is lacking under current mediation practices.

"With respect to institutional changes, an adequate mediation scheme should not only be voluntary rather than mandatory, but should also allow people's emotions to be part of the process, allow their values and principles to matter in the discussion, allow parties' attorneys to participate if requested by the parties, allow parties to choose a mediator and the location for mediation, allow parties to choose the issues to mediate, and require that divorcing couples be educated about the availability and logistics of mediation so as to enable them to make an intelligent choice as to whether to engage in it.

"The second aspect of reform represents more of a personal dynamic, one which is harder to institutionalize or to regulate. But the mediator must learn to respect each client's struggles,

California's Senate Task Force on Family Equity was concerned with fairness in mediation as well. The task force called for safeguards to protect parents from undue coercion in mediation. Like Professor Bruch, the Task Force concluded that fairness in mediation is a function of the individual mediator's commitment to fairness, pointing out that perceptions of fairness vary from county to county, both because of the highly individual approaches taken in different regions of the state, and because of the differing levels of mediator competence, qualifications, and training throughout the state.¹¹³ The task force asserted that biases, including gender bias and bias in favor of certain parenting arrangements, all affect the fairness of the mediation proceeding.¹¹⁴

Several witnesses at the public hearings and regional meetings corroborate the views of these critics. One Fresno family lawyer told the advisory committee that he was aware of 25 women who had complaints against a certain mediator.¹¹⁵ Regional meeting witnesses told committee members that mediator recommendations were "rubber-stamped" by the court and that mediators had preferences for equal time-sharing arrangements.¹¹⁶

A certified family law specialist who testified at the San Francisco public hearing pointed out the tyranny and injustice of expecting an abandoned party to quickly put aside all thought of grief and rage at the demise of a marriage and often at the betrayal of a spouse. The spouse might be expected, as early as 30 days after the breakup, to be willing to enter into mediation to arrive at a successful co-parenting plan. The certified specialist described a hypothetical case that she said occurred regularly in her practice in which a woman with young children learns of her husband's secret affair after perhaps a long marriage. The disclosure of the affair and other factors result in the end of the marriage. The husband, especially if he has immediate remarriage plans, quickly files for dissolution. The wife is then confronted with a proceeding for temporary custody that requires mediation. The attorney emphasized the fact that women are more apt to reveal feelings of grief and rage, whereas men are acculturated to hide those feelings. She also stated that more often than not it is the husband who has the affair when there are young children in the family, because the mother is occupied with bearing and caring for the children. The attorney also told the advisory committee members:

including her timing, anger, and resistance to having certain issues mediated, and also must learn to refrain, to the extent he is capable, from imposing his own substantive agenda on the mediation." *Id.*, pp. 1609–10.

¹¹³ See also, Grillo, *supra*, p. 1553, (in contrast to larger counties such as Los Angeles and San Francisco, "where mediators are for the most part well-trained and highly qualified, . . . in many areas of the state, mediation services are poor by any standard").

¹¹⁴ Senate Task Force Report, *supra*, pp. VII-22–23.

¹¹⁵ Fresno public hearing transcript, p. 274.

¹¹⁶ See, e.g., Orange County regional meeting summary, p. 1 (on file at the AOC).

And what happens then is that the message, whether explicit or implicit, is given to them by the mediator, and by the evaluator, and often in the chambers conference with the family law judge, that if the woman doesn't clean up her act and stop being so emotional and vindictive and angry and start looking at the present, and start moving from right now onto what's best for the children, then that's going to be a factor that will be considered by the court in making its ultimate custody award.

In other words, she's told perhaps 30 days after she's been left that she's not only lost her husband, but if she doesn't shape up fast, she's going to lose her children too, and I've seen it happen. I've seen courts make those orders. I've seen them made on the recommendation of evaluators and mediators who have looked at these situations and who have expected . . . that a woman would be able to transcend . . . probably the most devastating thing that could happen in a family situation, that she can transcend it . . . as quickly as the husband can get into court to put on a motion for temporary custody, and that's 20 to 30 days.¹¹⁷

More importantly, the attorney contended, the woman is probably going to be forced into a "co-parenting arrangement" that she is unable to live with, and then she will become a "basket case." The attorney concluded:

It's quite unfair, and what the courts are doing when they impose this kind of . . . inhumane, unspoken standard on women that they're supposed to recover instantly, what they're doing is compounding the injury, blaming the victim, call it what you will, but they're not being reasonable, and they're not being humane.¹¹⁸

Members of the public came forward at each public hearing and told committee members often heartbreaking stories of their experiences in mediation. While recognizing that these stories are necessarily affected by the parties' anguish at the results of their custody battles and cannot be individually evaluated, nevertheless the committee determined that this testimony demonstrates a public perception of unfairness in some cases and, at a minimum, a public misunderstanding of the process. One particularly poignant example follows:

I don't foresee any hope for him living [with] anything but what we're living right now, which is a joint custody situation. We have equal time. The father does not work. He has no job, no home to speak of. . . . I never know where he's going to be. I have no phone number to contact him when he's with the child.

¹¹⁷ San Francisco public hearing transcript, p. 114; see also *id.*, pp. 111–13.

¹¹⁸ *Id.*, p. 115–16.

. . . I have never had a judge order our custody arrangement. It has always been a mediator and her recommendations. She never took into account anything that was ever going on in our lives. She coerced me, in the beginning, to discontinue my breast feeding with the child so that the father's bonding rights were upheld. The more he insisted on, the more she gave him. The more she gave him, the less he followed through on what he wanted. He just continued to want more and more and more. The child is suffering and . . . everybody seems to be more concerned about the two parents, and somebody's going to have to look at these children, because they are our future.

They are going to be taking care of us when we're older, and if we have a whole society of mixed up children because the judicial system has . . . failed them, there is no hope for the future.¹¹⁹

• The Remedies

Mediators themselves are well aware that reforms are needed. The Family Court Services program at the Administrative Office of the Courts is engaged in a monumental effort to conduct statewide training and develop professional standards for mediators in accordance with legislative requirements.¹²⁰ In addressing mediators gathered for a statewide training conference, the former Director of the Administrative Office of the Courts strongly urged mediators to be aware of issues of equality of the sexes as well as issues of cultural diversity.¹²¹

Stressing some of the same criticisms of mandatory mediation, researchers at the National Center for State Courts have called for increased evaluation of the mediation process.¹²² According to this research, little reliable information can be gleaned from the few studies on mediation that exist, and findings on client satisfaction are equivocal. Especially needed are more studies analyzing gender-based differences in satisfaction with mediation. Development of management models are required to ensure "the dignity and the perceived thoroughness or carefulness of the procedure."¹²³ Finally, the fairness of the procedure is also dependent on the mediator's training, qualifications, and professional status.

¹¹⁹ *Id.*, pp. 248–49.

¹²⁰ Civ. Code, § 5180 et seq., repealed Stats. 1992, ch. 162, § 3 (Assem. Bill No. 2650); eff. Jan. 1, 1994; now see Fam. Code, §§ 1850–52.

¹²¹ Davis, *Family Court Services: What is the Future?* Address to the California Family Court Services Annual Meeting (March 17, 1988), Monterey, California; reprinted in 26 Conciliation Courts Review (December 1988), pp. iii–iv.

¹²² Myers et al., *Court-Sponsored Mediation of Divorce, Custody, Visitation, and Support: Resolving Policy Issues* (1989) State Court Journal 25, 27–28, 30.

¹²³ *Id.*, p. 26.

Accordingly, the advisory committee recommended that the problems identified by the critics of mediation be immediately addressed as follows:

1. The likelihood of mediator bias can be reduced by specific training programs on gender bias issues as they present themselves in mediation and by including an ethical duty to refrain from bias in the professional standards now being promulgated for mediators.
2. The process of "rubber-stamping" recommendations should end, and the accountability of the process should be improved by rules that require written recommendations by mediators and statements of reasons by judges for their reliance on those recommendations.
3. The crucial task of child custody evaluation should be undertaken by qualified professionals who meet minimum standards and follow uniform professional standards.
4. To ensure public understanding and fairness, the participants in the mediation process should be informed about the mediation process and the uses of the mediator's recommendation, and should also be afforded a simple grievance procedure for resolution of complaints of mediator bias or unfairness.
5. Adequate funding for these important tasks should be made a priority.

4. DEVALUATION OF FAMILY LAW

FINDINGS

In addition to the specific factors already described that impede the fairness of the family law courts, the various components of the entire system interact to create unfairness. This unfairness manifests itself in the form of inadequate allocation of judicial resources, delays, and conflicting and overlapping orders that affect families.

The advisory committee has identified this issue as one of gender bias for two reasons. First, historically, family law has been devalued and de-emphasized because it is associated with "women's issues" and "women's work." The care and feeding of the family, and hence its disintegration during dissolution, are associated with tasks that women traditionally have performed. Thus, family law was one of the few entrees for graduating women law students looking for law firm jobs a scant 25 years ago.

Second, to the extent the family law system malfunctions or inefficiently performs its vital tasks, women are much more often the losers, simply because they have less money. The primary caretakers in single parent families are much more often women, and they have fewer dollars with which to demonstrate their care and responsibility. When the system takes too much time, it is the impecunious spouse, usually the woman, who suffers most. A mother who alleges, for example, child sexual abuse against a child's father may be subject to conflicting rulings from the family, juvenile, and criminal departments of the court or even from those departments in other counties. Such lack of coordination and communication among these departments and courts hampers the mother's ability to protect her child.

Accordingly, the advisory committee found:

1. Too few judges are assigned and too few courtrooms are available to resolve family law matters in California.
2. The family law court has been relegated to an inferior status among the other departments of the court, and the proportion of the court's resources devoted to family law is not commensurate with its volume, complexity, or importance to the parties and society.
3. The lack of available family law resources has sometimes resulted in coerced settlements, coerced references to private judges, or denial of courtroom time.
4. Delay in family law is endemic and there is little case management; these factors adversely affect the impecunious spouse, who is more often the woman.
5. Conflicting orders affecting families, and a lack of coordination and communication among the various departments of the court, including those situated in different counties, further exacerbate these adverse conditions for those families who are in the most distress.

RECOMMENDATION 12

Request the Judicial Council to:

(a) Refer the question of the need for more family law judges to the Judicial Council Court Profiles Advisory Committee and suggest that the committee should reevaluate the method of weighting family law cases to

ensure that the number of bench officers available for assignment to family law is proportionate and appropriate to the family law workload;

(b) Approve in principle and instruct staff and the appropriate committee to draft amendments to the rules of court governing the duties of presiding judges to include a duty to allocate adequate judicial resources, with due regard to the constitutional and statutory priorities, to family law cases in proportion to the weights given family law cases in determining judgeship needs and ensure that those judicial officers assigned to family law receive training in family law; and

(c) Request the Center for Judicial Education and Research (CJER) to stress the need for affording the preference given to disputed custody trials by law in its judicial education programs for family law judges and presiding judges.

RECOMMENDATION 13

Request the Judicial Council to refer to the Family Law Advisory Committee the task of creating a pilot project applying the concepts of delay reduction and calendar management to family law cases. The advisory committee should work in cooperation with the gender bias implementation committee to ensure that issues of fairness are considered. The pilot project should be closely scrutinized and should contain both an evaluative and educational component.

RECOMMENDATION 14

Request the Judicial Council to instruct staff and the appropriate committee to develop protocols for coordination and cooperation among the family, juvenile, criminal, and probate departments within one court and among different courts as part of its implementation of Penal Code section 14010(b)(3), if funded, which requires the development of special procedures for coordination and

cooperation in case management when a child is involved in overlapping proceedings.

DISCUSSION AND ANALYSIS

- **Inadequate Allocation of Resources**

As Justice Gardner wrote as long ago as 1977:

[I]n its use of courtroom time the present judicial process seems to have its priorities confused. Domestic relations litigation, one of the most important and sensitive tasks a judge faces, too often is given the low-man-on-the-totem-pole treatment, quite often being fobbed off on a commissioner. One of the paradoxes of our present legal system is that it is accepted practice to tie up a court for days while a gaggle of professional medical witnesses expound to a jury on just how devastating or just how trivial a personal injury may be, all to the personal enrichment of the trial lawyers involved, yet at the same time we begrudge the judicial resources necessary for careful and reasoned judgments in this most delicate field—the breakup of a marriage with its resulting trauma and troublesome fiscal aftermath. The courts should not begrudge the time necessary to carefully go over the wreckage of a marriage in order to effect substantial justice to all parties involved.¹²⁴

At the public hearing in San Francisco, Justice Donald B. King quoted Justice Gardner's opinion, but concluded that improvements since 1977 have been only modest.

Justice King voluntarily sits on assignment in the Superior Court trying family law cases that have been set for trial three, four, or even five times. He described one county in which there were approximately 17 different judges assigned to family law within a two-year period, and he pointed to increasing social problems, such as drug use and domestic violence, that require greater attention and special expertise by family law judges. He also stated:

And these are the people who pay the taxes who support our courts. This is not some insurance company from Hartford. These are the people that live down the street. We treat them terribly. It's no wonder they feel there's some bias against them. There is. It's there. It's there in the whole system. And I think until we change the system, at least in the family law area, we can only expect modest results.¹²⁵

¹²⁴ *In re the Marriage of Brantner* (1977) 67 Cal.App.3d 416, 422, quoted by Justice Donald B. King in his remarks to the advisory committee at the San Francisco public hearing; San Francisco public hearing transcript, pp. 177–78.

¹²⁵ San Francisco public hearing transcript, p. 179; see also *id.*, pp. 178–80.

Similarly, at the Fresno public hearing, Ventura Superior Court Judge Steven Z. Perren decried the insufficient time allotted to resolve family law issues and the lack of resources in light of the significant issues presented. He called for giving family law the "principal spotlight" rather than relegating it "off to the side of the courthouse."¹²⁶ Similarly, in a judicial profile printed in the *Los Angeles Daily Journal*, a profile of Judge A. Richard Backus of the Sacramento Superior Court quoted him as saying:

I sometimes wonder about a system that is willing to spend a week on a personal injury automobile accident case involving a claim of \$10,000 and yet devotes so little resources, comparatively, to things that are really vital to people's lives. And [those things are] the dissolution of their marriage and the custody of their children. . . . [The work in family law] is high volume, high emotion and after awhile, when you are able to, you get out. Perhaps more continuity could be accomplished by a reduction in some of the stress and load on those departments.¹²⁷

Responses to the Judges' Survey confirm these assertions by family law experts and judges. Only 48.5 percent of the respondents stated that they have enough time to adjudicate adequately the temporary custody motions on their calendars. In contrast, 32.7 percent said that they thought they did not have enough time, and 18.8 percent said they did not hear temporary motions.¹²⁸

Judges were also asked an open-ended question about their views on the adequacy of facilities and staffing for family and juvenile law departments. The table below reflects the answer to the following question in the representative sample:

Please explain your view of whether the number of judges, the facilities, and the staffing for family law and juvenile departments are adequate. To the extent these resources are inadequate, what factors do you think contribute to the inadequacy?

Response	Percent
Resources, staff, facilities inadequate	29.3
Lack of funding causes inadequacy	13.3
Resources are inadequate	10.3
Nature, overabundance of cases causes inadequacy	9.5
Low priority of area causes inadequacy	6.8

¹²⁶ Fresno public hearing transcript, p. 115; see also *id.*, pp. 111–15.

¹²⁷ *Profile of Judge A. Richard Backus* (July 1987) *Los Angeles Daily Journal* 1, 5.

¹²⁸ Judges' Survey, question 28.

Response (cont'd)	Percent
There is a need for specialized judges in this area	8.1
No experience	8.4
Miscellaneous	<u>14.4</u>
	100%
	(n=100) ¹²⁹

Mediators and attorneys agree about the second-class status of family law. Dr. Mary Duryee, former Director of Family Court Services in Alameda County, recounted:

. . . I would second Justice King's statements about a bias that's more subtle in terms of family law, which is its second-class citizenship within the court, in terms of the amount of resources it gets, in terms of the . . . number of judges per case, and so forth.

In terms of the income that the staff make, for example, the family court services personnel, even though [they] have a great deal of training, and in addition have a requirement of two years of additional community service, plus a list of specialties in terms of experience to come up to, and unfortunately, I don't know how to understand this, but generally, those family court services people are women, probably 60 percent of them are women, and generally, of course, the judges are men.¹³⁰

Hannah Beth Jackson, a member of the Senate Task Force on Family Equity and certified family law specialist queried: "I would like to know why a \$15,000 or even a \$50,000 personal injury case can get a 10-day jury trial in the superior court, and a \$10 million, if you should be so lucky, case in a family law matter gets an hour or two hours, and maybe a day if you're lucky."¹³¹ Those gathered at the focus group for family lawyers at the State Bar Annual Meeting in September 1988 talked as well about the tendency to "force" settlement, sometimes unjustly, because of the unlikelihood that trial time will be afforded in complex family law cases.¹³²

¹²⁹ Judges' Survey, question 52.

¹³⁰ San Francisco public hearing transcript, p. 229.

¹³¹ Los Angeles public hearing transcript, p. 150; see also Sacramento public hearing transcript, p. 160.

¹³² See Judicial Council Advisory Committee on Gender Bias in the Courts, Summary of Family Law Focus Group at the State Bar Annual Meeting (Sept. 26, 1988), p. 5 (on file at the AOC) [hereinafter "Family Law Summary"].

An attorney at one of the regional meetings related the following case history:

I was involved, approximately a year ago, in a very heavily contested custody case in which there were substantial issues, among which was an allegation of sexual abuse supported by corroborating testimony of mental health professionals and others. In other words, this was a charge; whether true or not, it deserved attention. I think it deserved the attention of the judiciary.

We were on the trial calendar. Our case was called. Even though there were courtrooms available, I was told that there weren't any available for that case, and, quoting the judge, "Why wasn't this matter resolved in mediation?"

Well, I had a client, who happened to be the mother, who was very upset over this event in her life, and that of her child. Her husband, who was in danger of losing his medical license, was equally very upset by this whole proceeding. Both desperately needed to get it resolved, to get it behind them. We did not get a courtroom.

And when I pointed out to the judge that in custody cases there is a statutory preference in setting, the judge reacted as though I had the effrontery to bring that to his attention. Eyes rolled heavenward, and he said, "Dropped from the calendar."

. . . I don't know what I was supposed to tell that client. I didn't have an answer for her, but I think that illustrates the kind of—I'm going to call it bias, and I don't think it's too strong a word—the type of bias that . . . exists in many of our superior courts concerning problems that emanate from the family.

And if one wants to identify the root of that, I strongly suspect—I don't know, but I suspect that it has to do with the denigration of what are considered "women's issues" in our society.¹³³

Another certified family law specialist, who had also served as the chair of the State Bar family law section, further ascribed the denial of sufficient trial time to gender bias: "the person who is hurt in a family law case is usually the spouse who's not in control of either the money or the property. And as our society is currently constituted, that person is usually female."¹³⁴ The attorney went on to illustrate the point by describing a case in which the parties were forced to pay for a special master to resolve substantial and time-consuming property issues. Had the attorney's client been poor and the issues related to custody and visitation instead of money, this option would have

¹³³ San Francisco regional meeting summary, p. 2.

¹³⁴ San Francisco regional meeting transcript, p. 36.

been unavailable. Others confirmed that these problems were especially prevalent in those counties that send out family law trials on the master calendar rather than to an established family law department.¹³⁵ Attorneys in Orange County as well called for more family law judges.¹³⁶

- **Delay, Delay, Delay**

Professor Carol S. Bruch, when asked to provide the advisory committee with her ideal research agenda for family law, replied in part: "What are the effects of calendaring delays? Whether because mediation is taking place, or because there's a trailing calendar, or because of litigants' maneuvering. What is that impact on a needy spouse's ultimate awards? Is that person forced to settle? . . . [T]hese kinds of matters have a tremendous impact on the ability of the financially weaker person, obviously, most often, the woman, to maintain a posture which could maximize that person's award."¹³⁷

To reduce delay and its effects on family court litigants, Justice Donald B. King instituted his own program of individual case management in family law. He sits on assignment in the San Francisco Superior Court and selects specific cases. The parties stipulate to his hearing the matter and to a series of ground rules. His approach includes early judicial intervention, management and control of the litigation, informal exchange of discovery, and cooperative dealings with attorneys. He handles many tasks by conference call and believes his system may ultimately reduce litigation expense and save court time.¹³⁸ State Bar Board of Governors member and family law specialist Ms. Patricia Phillips has also called for active case management of family law cases from their inception.¹³⁹ Mediators, as well, recognize the need for case management and a system akin to the one Justice King has initiated on an experimental basis.¹⁴⁰

- **Conflicting Orders Affecting Families**

The advisory committee did not undertake to analyze the complex interaction among the family law, juvenile law, and criminal law departments that might affect families in cases such as those involving domestic violence or child abuse. Testimony was submitted, however, by both mothers and advocates attesting to the problems

¹³⁵ San Francisco regional meeting transcript, pp. 19–20.

¹³⁶ Orange County regional meeting transcript, p. 18.

¹³⁷ Sacramento public hearing transcript, pp. 107–08.

¹³⁸ San Francisco public hearing transcript, pp. 183–84, 191–94; Ziegler, *Family Law Makes a Try at Fast Track*, San Francisco Banner-Daily Journal I-1–2.

¹³⁹ Phillips, *Thoughts of a Practitioner* (Jan. 10, 1989) Los Angeles Daily Journal I-4.

¹⁴⁰ See testimony of Dr. Mary Duryee, San Francisco public hearing transcript, pp. 228–33; testimony of Dr. Alice Oksman, Los Angeles Public hearing transcript, pp. 249–51.

created when jurisdictional conflicts occur between the departments in one court and between different counties, especially in rural areas.

One family law attorney in Los Angeles described her representation of a father in a dissolution proceeding. In the course of the proceeding the mother alleged that the father had sexually abused his child. The family law department issued a custody and visitation order based on a psychiatrist's report. Subsequently, one of the child's counselors reported that the child displayed sexual awareness in play, and the child became the subject of a dependency proceeding. Thereafter, the father saw the child only in supervised visitation. Approximately one and one-half years later, the case was resolved, and no finding of child sexual abuse was substantiated.

The ultimate custody and visitation order was, however, more restrictive than originally suggested by the psychiatrist. The public hearing witness related this case to the advisory committee to show the way the different departments in the court interact or fail to interact, and how delays in the system potentially adversely affect parents. The attorney concluded: "There clearly has to be . . . at a minimum a better understanding between the family law judicial officers, and particularly those who have been doing family law for a long time and really don't understand how the dependency system works."¹⁴¹ Attorneys gathered at the State Bar focus group for family law attorneys also recognized that the lack of coordination between the family and dependency court causes problems for families.¹⁴²

Witnesses at the public hearings discussed the possibility of a family court, an issue that was debated when the original no-fault divorce law was promulgated.¹⁴³ A family court proposal has also been the subject of inquiries conducted by the Office of the California Attorney General¹⁴⁴ and the California State Senate.¹⁴⁵ Judges in general have opposed the creation of a family court, in part fearing that the juvenile and family law departments will suffer even less prestige and fewer resources than characterize the present situation.¹⁴⁶

Legislative reform will at least partially alleviate some problems. Welfare and Institutions Code sections 304 and 362.4 have been amended to provide that when a

¹⁴¹ Los Angeles regional meeting transcript, pp. 29–34.

¹⁴² Family Law Summary, *supra*, p. 4.

¹⁴³ See testimony of Prof. Herma Hill Kay, San Francisco public hearing transcript, pp. 58–59; 62–64.

¹⁴⁴ See California Attorney General, Final Report, California Child Victim Witness Judicial Advisory Committee (October 1988), pp. 38–39 (on file at the AOC).

¹⁴⁵ Sen. William Lockyer has convened a task force to study the issue, which issued a final report in November 1990. See Senate Task Force on Family Relations Court, Final Report (November 1990), (on file at the AOC). Although the task force ultimately decided against the creation of a separate family court, it did make a number of recommendations designed to improve the status and efficacy of family court decision-making.

¹⁴⁶ See testimony of Justice Donald B. King, San Francisco public hearing transcript, p. 193.

child is declared a dependent, all orders of the juvenile court take precedence over other orders or serve to modify existing orders. Orders issued by the juvenile court can be filed in and are effective in other counties. California Rules of Court, rule 1457, adopted by the Judicial Council, implements this legislation.

The Attorney General's report, referred to above, contained a recommendation that "[c]ourts and court systems should develop efficient means of communicating with each other regarding proceedings involving the same child or family."¹⁴⁷ Legislation implementing some of the recommendations contained in the report also provides that court systems should develop "special procedures for coordination and cooperation in case management when a child is involved in criminal and dependency proceedings, domestic relations and dependency proceedings, dependency and delinquency proceedings, or related domestic violence proceedings."¹⁴⁸ This aspect of the new legislation, if funded, will be supervised by the Judicial Council.

The advisory committee deferred to the expertise of other bodies specially convened to study this problem. The committee suggested, however, that its concerns regarding the conflicts among court departments and jurisdictions be considered by the Judicial Council when the new legislation is implemented.

• Conclusion

By calling for reallocation of judicial resources available to family law departments, adoption of a case management system designed to reduce delay and promote efficiency in family law, and development of protocols to reduce conflicts among departments and courts with jurisdiction over families, the advisory committee hoped to ameliorate inequities in the family law system in California. The advisory committee believed that these reforms will assist all families and the men, women, and children that comprise them. The committee emphasized, however, that the problems noted here disparately affect the spouse who is the primary caretaker of the children and the spouse who has the least access to and knowledge of the family finances—or indeed any available funds. More often than not that spouse is the wife.

5. OTHER BARRIERS TO FULL AND FAIR ACCESS TO THE COURTS FOR FAMILY LAW LITIGANTS

FINDINGS

In addition to the court management issues discussed in the previous section, the advisory committee examined the question of whether family law litigants enjoyed a meaningful right of access to the family law court. In analyzing this issue, the advisory

¹⁴⁷ Final Report, California Child Victim Witness Judicial Advisory Committee, *supra*, p. 48.

¹⁴⁸ Pen. Code, § 14010(b)(3), repealed by its own terms, *id.*, § 14021; eff. Jan. 1, 1994.

committee asked the question: Are there obstacles, other than those relating to allocation of resources, delay, and overlapping orders, that impede the right of access to family law litigants, and do these obstacles have a more deleterious effect on some litigants as compared to others? In the course of this inquiry, the advisory committee realized that, in practical effect, *the courthouse door is closed to many*. This fact is of particular concern because dissolving a marriage, determining custody, visitation, spousal support, and child support, and dividing property can only be accomplished in the courts. Although the courts use other methods along the way, there is no alternative dispute resolution method in family law that does not require, in the end, a court order.

Accordingly, the advisory committee found:

1. Public information on family law is grossly inadequate. Citizens do not know or understand the ways in which the family law court can and does affect their lives.
2. Representation in family law is grossly inadequate to serve the needs of the citizenry.
3. Inequities in the award of attorney's fees present serious obstacles to obtaining representation. These inequities include the denial of fees when they should be awarded according to case law and the granting of differential awards between male and female attorneys.
4. Additional obstacles to progressing through the family law system include obstructionist and unhelpful practices by clerks' offices, denial of appropriate requests for fee waivers, and imposition of job search requirements upon women receiving welfare grants for dependent children.
5. These barriers to access to the courts have their most serious impact on the poor and on the primary caretakers of children, who are most often women in the context of the family law court.

RECOMMENDATION 15

Request the Judicial Council to instruct appropriate committees to develop a general information booklet or other educational device for family law litigants setting forth the court's procedures regarding custody, mediation, investigation, enforcement of orders, definitions of relevant

legal terms, and the way to obtain an accounting of marital assets.

RECOMMENDATION 16

Request the Judicial Council to:

- (a) Officially transmit and commend the advisory committee report to the attention of the State Bar, especially with respect to those portions describing the current crisis in family law representation, which has a disparate effect on women litigants; and**
- (b) Urge the State Bar to conduct a study and report on solutions to this problem.**

RECOMMENDATION 17

Request the Judicial Council to support legislation introduced that would codify existing case law that requires the trial court in exercising its discretion to award attorney's fees under Civil Code section 4370 to consider the respective incomes and needs of the parties in order to ensure that each party has access to legal representation to preserve all of his or her rights.

DISCUSSION AND ANALYSIS

- Access to Information**

Members of the public who testified at the public hearings presented often very persuasive and eloquent accounts of the personal trauma they experienced in the family law courts. One witness told an especially moving story of her grief at the custody order in her dissolution. Her former husband moved to another state and sought a modification of custody. The court's order ultimately provided for equal time-sharing of the parties' young son, to be exercised on alternate weeks. The court's order further conditioned this arrangement upon the mother's move to the state where the father lived. The witness attributed the custody arrangement to the son's slight preference for living with his father and a custody evaluation that relied on a study purporting to suggest that the best interests of the child would be served by an award that preferred the parent of the same sex.

This young woman traveled from her home in a distant state to testify before the committee. She wrote articulate accounts of the events in her case. Her parents wrote to the committee as well. She appeared to the committee members as an intelligent and devoted parent. Her life had been seriously and adversely affected by the move she undertook to be able to share custody of her son. She lost her job, vested pension rights, and the care and comfort of living near an extended family. She incurred significant expense.

This witness did not come to the hearing to ask for intervention in her case, but rather to suggest that these serious matters, having such dramatic effects on people's lives, be explained to litigants and that they be given an opportunity to comment to the court on their experiences in mediation. Her suggestions included, among others: that judges should be required to state the reasons for their decisions (her own terse statement of decision was a mere one paragraph long), that the appeal process should be faster, at least less than the four years she was told to expect, that information should be gathered about what really happens in mediation and custody decisions, and that questionnaires should be sent to every person who goes through mediation in order to obtain feedback from the actual litigants about the process.¹⁴⁹

At least four to five witnesses at every public hearing came forward with personal stories of the ways in which they believed the court system had failed to adjudicate appropriately their dispute. Female witnesses told harrowing tales of child sexual abuse, unenforced child support, and custody orders requiring them to choose between moving long distances or sacrificing custody of their children. Male witnesses told of being denied visitation of their children and of lingering preferences for awarding primary physical custody of small children to their mothers.

The advisory committee also learned that a group of Ventura County citizens organized to protest what they considered unequal treatment for women in the Ventura Superior Court.¹⁵⁰ From the court's point of view, these allegations were unfounded. What is clear, however, is that a basic misunderstanding occurred. In commenting on the controversy in Ventura County, Judge Steven Z. Perren stated:

Well, one thing you can be relatively certain of, if the cases come to you for adjudication, there's a problem, the parents can't agree. The ones that can agree, you don't see. If the parents can't agree, whatever order you make is going to make somebody unhappy, and the somebody who is unhappy is going to focus on something that is going to explain something other than their own shortcomings, perhaps, [a]s the reason why the order went as it did. The judge is the most available target.

¹⁴⁹ Sacramento public hearing transcript, pp. 67–74.

¹⁵⁰ Los Angeles public hearing transcript, pp. 164–75; Fresno public hearing transcript, p. 105.

Now, it is true sometimes judges do make mistakes and the error is the judge's, but we have to find the resources, and we have to elevate the family law court to some status far higher than the one in which it now finds itself in order to, I think, avoid charges such as those which I now see of some form of bias or prejudice in favor of a mother or a father, particularly with respect to child custody.¹⁵¹

Included in the resources referred to by Judge Perren must surely be improving the information we dispense to family law litigants. Courts throughout the state have embarked on a public education program. In Sacramento, San Francisco, and in Marin, judges have conducted public meetings so that citizens can meet the judges and understand the way in which the court works. Judges are recognizing that the public's understanding of the court system is minimal, and that when the system intimately and adversely affects their lives, the reaction is angry.

Thus, the advisory committee suggests that providing the public with information about family law should be a high priority. In general, courts should provide information about mediation and custody, the enforcement of court orders, the definitions of relevant legal terms, and the way to obtain an accounting of marital assets. A beginning might be to provide an informational booklet or other educational device that is multi-cultural and that seeks to dispel some myths and misconceptions about family law.

- **Access to Representation**

Lack of representation. Judges were asked the following question on the Judges' Survey: "During the last three years have you observed an increasing number of family law litigants appearing in your courtroom who are unrepresented?" 60.8 percent of the judges responded "yes" and the remaining 39.2 percent responded "no."¹⁵² Thus, a large number of judges realize that unrepresented parties are increasing in our family law courts. The judicial respondents were also asked to describe any problems for the parties or the court resulting from family law litigants' lack of representation. The chart on the next page illustrates their responses.

¹⁵¹ Fresno public hearing transcript, p.113.

¹⁵² Judges' Survey, question 39a.

Response	Percent
Problems for the court, poor presentation, delay, burden on court personnel	45.6
Unfair results or treat- ment, lack of knowledge regarding issues, rights	36.8
Miscellaneous	8.0
No or very few problems	8.0
No experience in this area	1.6

Finally, judges were asked what means they would suggest to ensure fair treatment for unrepresented parties. Of the respondents, 16.1 percent suggested expanding assistance by paralegals and nonattorneys, and 20.7 percent suggested expanding attorney and pro bono representation. An additional 29.9 percent suggested that court intervention, assistance, and referral might be appropriate.¹⁵³

The survey responses reflect strong recognition among judges that parties increasingly appear without representation; that problems are created for the court; that, more importantly, fair results are jeopardized; and that increased representation or intervention is necessary.

Attorneys and others at the regional meetings joined with judges in recognizing the growing crisis in family law representation. Mablean Paxton, then chair of the Board of Directors of the Harriet Buhai Center in Los Angeles, a program devoted to helping indigent family law litigants, testified that the demand for representation is so great that the Center's assistance is limited to the preparation of documents. Attorneys do not appear in court. This means that the program's clients, the great majority of whom are women, have no access to representation, cannot afford to hire experts to evaluate a house or a pension, and desperately need simplified procedures or other means of obtaining representation.¹⁵⁴ The lack of representation was also observed by Hugh McIsaac, former Director of Family Court Services in Los Angeles, who

¹⁵³ *Id.*, question 39b; question 39c; other responses included miscellaneous (29.9 percent), no experience (2.3 percent), and move to a nonadversarial method or alternative dispute resolution method (1.1 percent).

¹⁵⁴ Los Angeles public hearing transcript, pp. 98–99; 103–04; 156; 162–63.

suggested increased support for legal aid and the development of alternative dispute resolution methods.¹⁵⁵ A certified specialist who practices in Ventura and Santa Barbara pointed out that often women have no access to the family's financial records and no money to pay counsel fees for discovery.¹⁵⁶

Attorney's Fees. In *In re Marriage of Hatch* (1985) 169 Cal.App.3d 1213 the appellate court emphasized that, under Civil Code section 4370,¹⁵⁷ the trial court must consider the respective incomes and needs of the parties in awarding attorneys fee's, with a goal of ensuring *each party* access to legal representation. As Justice King stated, "California's public policy in favor of expeditious and final resolution of marital dissolution actions is best accomplished by providing at the outset of litigation, consistent with the financial circumstances of the parties, a parity between spouses in their ability to obtain effective legal representation."¹⁵⁸ This laudable objective continues to be ignored. For example, Kate Yavenditti, a staff attorney at the San Diego Volunteer Lawyer Program, stated:

I think that those of us who represent low income women come into court with a mark against us. . . . I mean, I've made comments to judges about it, . . . you know, I know what you're going to do to me because you know who I represent and they laugh it off. But it's not a laughing matter, it's an absolute reality. We come into court and we don't get attorney's fee orders, . . . or [we get] lower attorney's fee orders, or . . . the attorney's fees will be deferred.

Now, that doesn't matter to me a tremendous amount, because I'm paid staff at [the] Volunteer Lawyer Program. But that matters a lot to our hundreds of attorneys who take pro bono cases, and who have the ability to ask for attorney's fees in court, and are not receiving them, but have to come back over and over again for returns on job searches, for returns to review visitation, for that sort of thing.¹⁵⁹

A long-time family law attorney in Fresno corroborated this information and described the plight of poor women as follows:

. . . . I think there is a real problem when you have a woman who is forced on to welfare as a result of the family breakup, and the attorney goes into court and asks for attorney's fees, and it is postponed, deferred, postponed, deferred, and here is a poor woman who is trying to get representation to fight the bread-winner of the family who has all the money and she is penniless. And I will tell you that as an attorney, it is

¹⁵⁵ Los Angeles public hearing transcript, p. 137.

¹⁵⁶ Los Angeles public hearing transcript, pp. 152–54.

¹⁵⁷ Civ. Code, § 4370 is now found in Fam. Code, §§ 270, 2030–31.

¹⁵⁸ *Id.*, pp. 1215–16.

¹⁵⁹ San Diego public hearing transcript, pp. 142–43.

very difficult to represent these people when there is no money in the
offing.¹⁶⁰

In Alameda County, the director of Family Court Services reported, attorney's fees were routinely denied at the time of the OSC hearing until bench and bar meetings were conducted to resolve the issue. As a result of these meetings, the court adopted a local rule regarding the award of fees to the spouse who has no access to the community property.¹⁶¹ Justice Donald B. King, the author of the *Hatch* case, vigorously supports the award of attorney's fee whenever possible, as does Ventura Superior Court Judge Steven Z. Perren.¹⁶² Attorneys at the Los Angeles, San Francisco, Butte, Orange, and Fresno regional meetings all confirmed the lack of appropriate attorney's fees awards. In Fresno, attorneys even reported that male lawyers were paid more than female lawyers for the same amount of work. One attorney stated: "I have been told on at least two occasions by two different judges, who balked at the amount of attorney's fees . . . I have suggested, that when other male attorneys have asked for attorney's fees, the judge has suggested greater amounts, and I have been told with them looking me in the eye, 'You don't need as much as he does.'"¹⁶³

Affiliates of California Women Lawyers conducted a survey of 21 counties to determine local practices regarding the award of attorney's fees. Most counties reported that the majority of family law judges decline to award attorney's fees at the time of the temporary order. When fees are awarded, they are inadequate. Answers varied greatly on the question of fee orders at the time of trial. Most counties responded that when fees are ordered based upon the ability to pay, they are not adequate. Most survey respondents noted that this practice adversely affects the ability of the spouse with little or no income, most often the woman, to retain counsel. Comments on the reasons for these practices included the following: the general lack of assets of the family; the lack of understanding of the current costs of litigation; the tendency to base the fee awards on a fixed schedule rather than on actual costs or ability to pay and needs; some judges' tendency to overlook the fact that equal division of the property (especially in the case of a deferred sale) does not necessarily amount to equal ability to pay fees; and the tendency of some judges to view attorney's fees as "punishment" to the payor.

Other court procedures and practices. The committee determined that the lack of available representation and the failure to grant appropriate fee awards effectively bars the courthouse door for many, especially for poor women. Moreover, the greater percentage of poor women tend to be members of racial and ethnic minorities, and thus discrimination and bias uniquely combine to create serious adverse effects on poor

¹⁶⁰ Fresno public hearing transcript, p. 267.

¹⁶¹ San Francisco public hearing transcript, p. 233.

¹⁶² *Id.*, pp. 194–98; Fresno Public hearing transcript, pp. 115–70.

¹⁶³ Fresno regional meeting transcript, p. 35.

women of color in the family law system. However, for a woman who does manage to get her toe in the door, the welcome is far from hospitable. Witnesses told the committee members, especially at the regional bar meetings, about practices and procedures that suggest a climate of bias and hostility.

In Orange County, for example, an attorney related her view that poor women are especially discriminated against. She told the committee:

To some extent in our society we base our respect for other people on their success and that is very often defined by economics. And this carries over to credibility, it carries over to sympathies. I think that there is a sort of unconscious feeling that is projected perhaps by members of the bar as well as the bench that if only the poor worked harder that they would make more money and they would be more successful and they would be better off in what they're doing. To the extent that women are poorer, this comes out as militating against them.¹⁶⁴

A paralegal in Butte County who assisted women in obtaining temporary restraining orders and who worked at a rural legal services office covering five counties reported:

It is very difficult to tell sometimes whether what the client is experiencing is gender bias or if it is because the client is poor. And it is real tough to separate those two. *Poor people are treated with a contempt that middle-class people are not treated with.*

When I prepared a woman for court, I would go through, 'This is how you dress.' Some women would show up anyway in what they had, which was not very nice. They would not get what they wanted as easily as another woman who was dressed better¹⁶⁵ (Emphasis added)

Within this sometimes hostile climate, practices and procedures have developed that seriously impair litigants' access to the family law court. As counties encounter increasing fiscal problems, they search for ways to reduce expenses. One of these ways, apparently, has been the denial of appropriate fee waivers in family law matters. This was reported in Butte County and neighboring counties and in the Fresno area. A Fresno family lawyer told the committee that fee waivers are denied for all those who are not receiving welfare benefits—even if their income levels would qualify them for fee waivers.¹⁶⁶ A legal aid attorney reported that in two Northern California counties courts require proof of public assistance eligibility before a fee waiver application can

¹⁶⁴ Orange County regional meeting transcript, p. 28.

¹⁶⁵ Butte regional meeting transcript, pp. 41–42.

¹⁶⁶ Fresno public hearing transcript, p. 268.

be filed, despite the application's requirement of a declaration under penalty of perjury.¹⁶⁷

In one Northern California county, the court conducted what was described as a "fee waiver calendar," although the fee waiver applications are required to be kept confidential. All persons whose fees were waived went to a special calendar where they were grilled in a derogatory fashion, and most of the people appearing on the calendar were women. This practice is no longer followed, but only as a result of litigation.¹⁶⁸ In another county, the court took the position that a fee waiver did not apply to the fees charged for mediation. Only after negotiation with counsel for the fee waiver applicants was the practice of denying waivers for mediation fees terminated.¹⁶⁹

Practices in clerks' offices can also create barriers, especially for the unrepresented party. A legal aid attorney from a rural community told the committee members:

There also is a tendency of the clerks if you are sending a pro per client that the pro per client is treated with disrespect, especially if the pro per client is a poor woman than if you have an advocate going in asking for the same forms. . . . If you are poor or you get labeled with that label of being poor or coming from the "wrong side of the tracks" . . . [you] do not get treated the same.¹⁷⁰

Perhaps the most serious example of a practice that clearly impeded poor women's access to the courts occurred in San Diego. There, a family law department imposed a requirement that women on welfare who appeared before the court either as parties in default divorces, or as applicants for temporary restraining orders, or even as witnesses in actions to collect child support brought by the district attorney, were ordered to show proof of job searches or face possible reduction of their welfare grants. The women involved were unrepresented.¹⁷¹

One of the attorneys who initiated litigation seeking to prohibit this practice described the effects of a job search order on the hundreds of women who have been affected. The women feel victimized, degraded, and humiliated. They often refuse to go to court, even when a restraining order is vital to their safety. As one victim of this practice told the advisory committee, "I totally felt he [the judge] was very condescending in the courtroom, not only to myself, but I felt to all women, and especially ethnic people. . . . [H]e asked me if I thought that it was fair for me to be

¹⁶⁷ Sacramento public hearing transcript, p. 170.

¹⁶⁸ Butte regional meeting transcript, pp. 159–60.

¹⁶⁹ Butte regional meeting transcript, p. 161.

¹⁷⁰ Butte regional meeting transcript, p. 177.

¹⁷¹ San Diego public hearing transcript, pp. 128–34, 139.

able to go to college and receive a four-year degree when other women weren't even able to finish high school, and he was making them support their children full-time, and why couldn't I go to work full-time and go to school at nights" ¹⁷² No similar job search requirements have been imposed on women who are not working and not receiving welfare benefits. ¹⁷³

This practice was ultimately prohibited by the Court of Appeal in *Anderson v. Superior Court* (1989) 213 Cal.App.3d 1321. The court stated:

Much of the outrage expressed by the petitioners and others over the court's job search orders relates to the dignity interest recognized under the California Constitution. . . . [W]e can understand how the court's actions here could be viewed as "unfair" and "arbitrary." At the very least it is counterproductive to require a custodial parent who is caring for a preschool child, attending college and/or working part-time to cease relying on AFDC benefits and find a full-time job. Consistent with the interest in fostering dignity and respect, legitimate efforts within AFDC guidelines to improve skills and education should be encouraged, not thwarted. We therefore hold that the court violated the petitioners' due process rights when it failed to provide adequate and timely notice of the family law procedure through which their AFDC benefits could be reduced or lost. ¹⁷⁴

The committee members were further shocked to learn that the same court on occasion required non-English-speaking women to learn English. One of the attorneys involved in *Anderson* reported:

I have seen this court not only make job search orders for women on welfare, but order non-English speaking women to learn English. You come back here in a month, and if you haven't learned English, or if you're not speaking English, you're [not] in a class, then I'm going to order you off welfare. You know, that's certainly an issue for women of color, and as far as I'm concerned, it's an order that the court can't make. ¹⁷⁵

Lack of affordable representation, denial of attorney's fees and fee waivers in a manner contrary to statute, and imposition of job search and language requirements, are all factors that conspire to deprive poor family law litigants, especially those who are female and members of ethnic or racial minorities, of their rightful access to the courts.

¹⁷² *Id.*, pp. 140–41.

¹⁷³ *Id.*, p. 131.

¹⁷⁴ *Anderson v. Superior Court* (1989) 213 Cal.App.3d 1321, 1331. A more forceful and separate concurring opinion written by the same justice who authored the unanimous opinion of the court expressed serious doubts about the authority of the family law court to order job searches that would not be authorized under the federal and state statutory welfare scheme.

¹⁷⁵ San Diego public hearing transcript, p. 145.

In the committee's view, the State Bar should consider this a crisis in representation and take immediate steps to investigate ways to extend the right to legal representation in family law. Further, the case law relating to the award of attorney's fees should be codified

V. CONCLUSION: FAMILY LAW AND THE FUTURE

FINDINGS

The topics considered in this chapter of the report collectively suggest an urgent need for information and research. The committee members were faced with determining whether bias exists in a family law system that provides researchers with very little data. Indeed, the committee members observed that in California major social policies concerning families are initiated often with little or no evaluative components. When statutory changes are criticized and resulting reversals of policy occur, it is again often without the benefit of comprehensive research and evaluation. The committee's work was especially hampered by the absence of this information.

The committee therefore found:

1. Changes in family law are often initiated without a proper research foundation and without regard to future evaluation of the social experiment proposed.
2. Without proper research and evaluation, a study of unfairness in the courts is seriously hampered.
3. California is no longer part of a national data collection system on family law.
4. The failure to conduct appropriate research and collect necessary data is in itself bias because it insulates policies and practices from meaningful review and criticism and because similar inadequacies are not present in other fields.

RECOMMENDATION 18

Request the Judicial Council to seek additional funding to add staff, budget, and other resources to provide for and ensure the creation of a uniform statistical reporting system in family law as required by statute and to

reevaluate the priorities for research grants funded by the Family Court Services Program in light of this report.

DISCUSSION AND ANALYSIS

C. THE NEED FOR RESEARCH AND ADEQUATE STATISTICAL REPORTING

Family Code section 1850(b), formerly Civil Code section 5180(b), provides that the Judicial Council shall:

Establish and implement a uniform statistical reporting system relating to proceedings brought for dissolution of marriage, for nullity of marriage, or for legal separation of the parties, including, but not limited to, a custody disposition survey.

The statute further requires the council to:

Administer a program of grants to public and private agencies submitting proposals for research, study, and demonstration projects in the area of family law, including, but not limited to, all of the following:

1. The development of conciliation and mediation and other newer dispute resolution techniques, particularly as they relate to child custody and to avoidance of litigation.
2. The establishment of criteria to insure that a child support order is adequate.
3. The development of methods to insure that a child support order is paid.
4. The study of the feasibility and desirability of guidelines to assist judges in making custody decisions.

(d) Administer a program for the training of court personnel involved in family law proceedings, which shall be available to the court personnel and which shall be totally funded from funds specified in Section 12852. The training shall include, but not be limited to, the order of preference for custody of minor children and the meaning of the custody arrangements under Part 2 (commencing with section 3020) of Division 8.¹⁷⁶

With limited funds and extensive, mandated responsibilities, the Statewide Office of Family Court Services has made admirable progress in carrying out these statutory

¹⁷⁶ Fam. Code, § 1850(c) and (d); formerly Civ. Code, § 5180(c).

duties.¹⁷⁷ It is the hope of the advisory committee, however, that this important work can continue and can be augmented to address the special concerns of the committee.

In virtually every area of the committee's inquiry relating to family law, practitioners, mediators, and professors spoke of the urgent need for more information and more research. The purpose of this section is to catalogue some of the suggestions received and to suggest that the implementation committee proposed in a later section of this report participate with the Statewide Office of Family Court Services in the research and information gathering choices to be made in the future.

An urgent call for more funding for research in family law was also issued at a conference sponsored jointly by the Earl Warren Legal Institute of the University of California at Berkeley and the Institute for Research on Women and Gender of Stanford University in November 1988. There, distinguished scholars from throughout the country discussed the need for the development of more state-specific information so that new social policies can be assessed and the effects of already instituted changes in the law can be evaluated.

What follows is a brief summary of some of the suggestions made at the public hearings conducted by the advisory committee. This summary is derived from the testimony of the following experts: Dr. Janet Johnston, Director of Research, the Center for the Family in Transition, and Associate Professor, Stanford University; Hugh McIsaac, former Director of Family Court Services for the Los Angeles Superior Court; Betty Nordwind, executive director of the Harriet Buhai Center for Family Law in Los Angeles; Herma Hill Kay, Dean, University of California at Berkeley, Boalt Hall School of Law; and Carol S. Bruch, Professor, University of California at Davis, Martin Luther King, Jr., School of Law.¹⁷⁸

First, California needs to participate once again in national data collection efforts to establish basic demographic information about the parties to dissolution proceedings in California. Without this basic information, California's practices cannot be compared to those in other states, and national research is hampered. We need to discern whether differential treatment occurs with respect to low-income parties, and we need to be able to compare practices and procedures in different parts of the state. An examination of whether there are impediments to access to the courts should be undertaken. An evaluation and "feedback" loop must be created when new law or policies are adopted.

¹⁷⁷ For a comprehensive description of the considerable accomplishments of the program, see Administrative Office of the Courts' Report on Family Court Services, Apr. 19, 1989; prepared for the Assem. Jud. Comm. Information Hearings (on file at the AOC).

¹⁷⁸ The testimony of these experts can be found at San Francisco public hearing transcript, pp. 55-67; 208-16; Los Angeles public hearing transcript, pp. 135-46; 156-64; Sacramento public hearing transcript, pp. 104-23.

Information on child support, including statistics on its collection and whether judges are deviating from the guidelines, is needed. Similarly, the relationship between child support and spousal support should be examined, and an analysis of the interplay between custody and support should be undertaken.

Custody is an especially important area of inquiry. We need to know what the effects of divorce on children really are, particularly in high-conflict families. An examination of the viability of a primary caretaker standard in custody should be conducted, and the interplay between custody and parents who move to distant locations should be studied.

These areas of inquiry have proved to be vital to the study begun by the advisory committee, but the corroborative data gathered by the committee is incomplete. To institutionalize the changes suggested in this report, a more vigorous and comprehensive research program must be launched.

D. THE NEED FOR JUDICIAL EDUCATION

Judicial education in family law is essential to gender fairness in decision-making. This principle was espoused by Justice Donald B. King, who equated judges' success in putting aside bias with the benefits of judicial education.¹⁷⁹ Dr. Mary Duryee, former Director of Family Court Services for the Alameda Superior Court, concurred: "[I]n the absence of that experience as a family law judge, and training from organizations like CJER, . . . judges tend to rely on, and fall back on their own personal experiences. . . ."¹⁸⁰ Dean Herma Hill Kay noted for the committee that the no-fault divorce law was predicated on the creation of "an educated judiciary sensitive to the concerns of women and children in family law cases. . . ."¹⁸¹ Certified family law specialists recognized the need, calling for education on spousal support awards and the economics of divorce, the realities of child support schedules, and joint custody.¹⁸²

The Judges' Survey asked: "In your opinion, in which of the following areas of judicial education should increased attention be paid to the effects of gender bias on the court system?" Judges could choose among the following: criminal law, civil law, family law, juvenile law, other, and none. If a category of education was selected, the judge was asked to list specific issues that need to be addressed. Of the respondents 34.5 percent indicated that increased attention to gender bias issues in family law would be desirable. Within family law, the most commonly cited areas for increased attention were custody and visitation (37 percent) and support and economics (25.9 percent).¹⁸³

¹⁷⁹ San Francisco public hearing transcript, p.173.

¹⁸⁰ *Id.*, p. 230.

¹⁸¹ *Id.*, p. 58.

¹⁸² Sacramento public hearing transcript, pp. 147, 158.

¹⁸³ Judges' Survey, question 55a

Thus, judges, mediators, professors, and practitioners have urged increased judicial education in family law as the clear path to ensuring gender fairness in our courts.

In general, education programs to be developed on gender bias issues in family law should include:

- Information concerning the economic impact of dissolution, including (1) the impact on the parties, and especially on the caretaker spouse, and (2) the general costs of living, and the costs of child rearing and of child care.
- The importance of early attorney's fees orders.
- The issues surrounding the concept of joint custody and the factors to be considered in making custody determinations.
- Sensitization to the problems of pro per litigants in family law courts, and awareness of programs available to provide counsel to indigent and low-income persons.
- Knowledge concerning resources available to the court and to litigants in family law matters.
- Avoidance of the use of stereotypes in all areas relating to family law, and most particularly in the division of assets and in the awarding of custody and visitation.
- Appropriate procedures in child sex abuse cases, especially with respect to credibility determinations.

The members of the advisory committee unanimously concluded that, with ambitious programs of research, judicial education designed to analyze and monitor our policies and practices in family law, and judicial access to this much-needed information, gender equality in family law may truly be achieved.

Chapter Six

Domestic Violence

I. INTRODUCTION

In Welfare and Institutions Code section 18290, the Legislature announced:

The Legislature hereby finds and declares that there is a present and growing need to develop innovative strategies and services which will ameliorate and reduce the trauma of domestic violence. There are hundreds of thousands of persons in this state who are regularly beaten. In many such cases, the acts of domestic violence lead to the death of one of the involved parties. *Victims of domestic violence come from all socioeconomic classes and ethnic groups, though it is the poor who suffer most from marital violence, since they have no immediate access to private counseling and shelter for themselves and their children.* Children, even when they are not physically assaulted, very often suffer deep and lasting emotional effects, and it is most often the children of those parents who commit domestic violence that continue the cycle and abuse their spouses.¹ (Emphasis added.)

In marked contrast to this legislative declaration, the testimony and survey responses examined by the committee illustrate a wide and disturbing disparity between the intent of the law governing domestic violence and its actual application.

California's Legislature and courts have long recognized that domestic violence is a problem of vast proportions. No less than three statutory schemes exist to combat the problem. For example, Welfare and Institutions Code section 18290, first enacted in 1977, urged the creation of domestic violence centers to aid victims and included extensive legislative findings. In its findings, the Legislature emphasized the huge numbers of victims, the presence of violence without regard to socioeconomic or ethnic group, the particular suffering of the poor due to lack of access to counseling and shelter, the harm perpetrated on children, and the likely continuing cycle of violence. A second

¹ Welf. & Inst. Code, § 18290.

legislative enactment, the Domestic Violence Prevention Law (DVPL), became operative in 1980, and is now codified in the new Family Law Code section 5510 et seq.² The law provides a comprehensive statutory scheme for the issuance and enforcement of civil restraining orders designed to protect victims of domestic violence. Finally, domestic violence has long been recognized in California as a crime. (See Pen. Code, § 273.5.)

The advisory committee noted that marked improvements have occurred in providing services to the victims of domestic violence, and that the California judiciary is strongly committed to resolving issues of domestic violence in the courts. Responses to the Judges' Survey indicate, for example, that 75 percent of the representative sample of respondents disagreed or strongly disagreed with the statement, "I prefer not to handle domestic violence proceedings."³ Of the responses, 82.8 percent disagreed or strongly disagreed that court staff view domestic violence proceedings as more burdensome than other types of cases.⁴ This response is particularly noteworthy in light of the acknowledged difficulties presented by domestic violence proceedings: the emotional turmoil of the parties, the danger to public safety, and the problems of proof when complaining witnesses recant.

The committee nonetheless concluded that the courts can and should play a more effective role in the realization of legislative reforms begun long ago. As a formerly battered wife testified:

One's worst nightmare is being a victim of domestic violence . . . I found that not only did the judiciary lack an understanding of me, but as well, its extended branches, law enforcement, attorneys in the courtroom. At times, there was even a lack of understanding among the friends I had. . . .

I ask that you consider . . . what recommendations can be done within the judiciary that can improve the system. It's been an ordeal for me. I really don't want to have to come back.⁵

The committee heard repeated and moving testimony that the courts offer the last, and sometimes the only, protection available to vast numbers of people seeking to end the violence in their lives. It also heard repeated and disturbing testimony that victims of

² At the time this report was issued in draft form, the statutory provisions governing domestic violence restraining orders were set forth in the Domestic Violence Prevention Act (DVPA) (Code Civ. Proc., § 540 et seq.). Subsequently, pursuant to legislative directive, the Law Review Commission codified all statutes relating to family and child civil proceedings into one, new Family Code. It was enacted in 1992 and became operative Jan. 1, 1994. The commission did not attempt to make substantive changes in the law. However, between the issuance of this report in draft and in final, the Legislature did independently make minor substantive changes in the Domestic Violence Protection Law (DVPL). These changes will be noted, where appropriate, in the text or footnotes of this chapter.

³ Judges' Survey, question 13a.

⁴ *Id.*, question 12c.

⁵ Los Angeles public hearing transcript, pp. 120, 126–27.

domestic violence are often denied access to the protection of the justice system. The committee concludes that the justice system, when it fails to deal effectively with victims of domestic violence, contributes to their victimization.

Numerous statistics on the nature and extent of domestic violence were brought to the committee's attention. The statistics are offered here, not as proof to support the stated facts, but to emphasize the severity of the problem that the courts must face:

- An estimated 30 percent of female homicide victims in this country are killed by their husbands or boyfriends.⁶
- Almost 60 percent of married women are subject to physical abuse by their husbands at some time during their marriages.⁷
- An estimated three to four million American women are battered each year by their husbands or partners.⁸
- In the second half of 1986, in California, the total number of domestic violence calls for help received in all counties equaled 83,661.⁹
- The National Crime Survey showed that after a woman is first victimized by domestic violence, she faces a high risk of being victimized again.¹⁰
- The California Legislature has accepted research demonstrating that 35 to 40 percent of all assaults are related to domestic violence. The Legislature also concluded that "[t]he reported incidence of domestic violence represents only a portion of the total number of incidents of domestic violence."¹¹
- Battering occurs in all racial, economic, and religious groups, in rural, urban, and suburban settings.¹²

⁶ See, e.g., FBI Uniform Crime Reports, *Crime in the United States* (1986), p. 11; Crites, *A Judicial Guide to Understanding Wife Abuse* 24 *Judges' Journal* 5 (1985) [hereinafter "Understanding Wife Abuse"].

⁷ Baker and Fleming, *Stopping Wife Abuse* (1979), p. 155.

⁸ Lerman, *Mediation of Wife Abuse Cases: The Adverse Impact of Informal Dispute Resolution on Women* (1984) 7 *Harv. Women's L.J.* 57, 62, citing Stark et al., *Wife Abuse in the Medical Setting: An Introduction for Health Personnel* (1981), p. vii.

⁹ California Bureau of Criminal Statistics, *Domestic Violence: Data Information and Limitations*, July 13, 1987 (on file at the AOC). See also written comment, Dr. Mildred Pagelow.

¹⁰ Goolkasian, "Confronting Domestic Violence: The Role of Criminal Court Judges," (1986) *National Institute of Justice—Research in Brief*, p. 2.

¹¹ See Preamble to Pen. Code, § 13700 (1984).

¹² Lerman, *supra*, p. 63.

- Ninety-five percent of all victims of domestic violence are women.¹³

As these statistics reflect, although domestic violence is a crime that affects men and women, both young and old, *women are the primary victims of domestic violence*. Failure to protect domestic violence victims and to ensure their access to both the civil and criminal justice systems unquestionably has a disparate impact on the women of this state. A second element of bias occurs when the application of the laws and procedures governing domestic violence reflects deeply imbedded myths and stereotypes about the roles and nature of men and women. Indeed, gender bias in all of its manifestations is present in this state's judicial response to domestic violence.

Laura Crites, in her article "Wife Abuse: The Judicial Record," describes some of the stereotypes that have been applied historically to victims of domestic violence: women, because of their inherent nature, are to be controlled by their husbands and physical force is a legitimate means of asserting that control; the husband is the legitimate head of the household and guards its privacy from intrusion ("a man's home is his castle"); and women provoke or deserve abuse.¹⁴

In another article, Crites states:

Gender bias can affect a judge in spouse abuse cases in the following three ways: (1) blaming the victim for not meeting her husband's needs and for provoking the violence; (2) tending to accept the husband's testimony over his wife's, and (3) identifying with the husband as a victimized male.¹⁵

Other common and traditional stereotypes about women—that women are not credible, that they are overly emotional and tend to exaggerate, and, that their concerns are less important and their thoughts less valuable than those of men—may all affect the judicial response, indeed society's response, to domestic violence.

Again and again, this committee heard testimony that the justice system relied on stereotypes in responding to domestic violence. Police officers, district and city attorneys, court personnel, mediators, and judges were reported to treat victims of domestic violence as though their complaints were trivial, exaggerated, or somehow their own fault. Some court officers were reported to have said as much, and some domestic violence victims and advocates imputed to court officers the deliberate intent to convey these messages. Most testimony, however, revealed that domestic violence victims

¹³ U.S. Dept. of Justice, *Report to the Nation on Crime and Justice: The Data* (October 1983), p. 21; see also written comment, Dr. Mildred Pagelow.

¹⁴ Crites, "Wife Abuse: The Judicial Record," in *Women, the Courts, and Equality* (1987), pp. 38, 46–51.

¹⁵ "Understanding Wife Abuse," *supra*, p. 12.

perceived that they were not taken seriously, that they were not believed, and that their safety was of little concern to the justice system. Witnesses repeatedly testified, in effect, that "the judge did not seem to understand."

Based upon the perceptions and realities of injustice revealed in the testimony, the committee concluded that (1) some judges and court personnel approach domestic violence cases, whether consciously or unconsciously, with assumptions based upon stereotypes and biases such as those described above; and (2) some judges and court personnel lack information about the psychological, economic, and social realities of domestic violence victims.

II. CHAPTER OVERVIEW

To combat the effects of gender bias in the courts' response to domestic violence, the committee made a number of recommendations to the Judicial Council, which the council has now adopted. In several instances, the committee identified issues of substantive law that adversely affect domestic violence victims. Because the Judicial Council does not usually propose legislation to amend the substantive law, the committee set forth a limited number of "special findings" that did not result in specific recommendations. In some instances, special findings were reached when the committee agreed that a problem existed but did not agree on the appropriate remedy.¹⁶ These findings were offered to make a record in those areas that may require further inquiry and curative legislative proposals, and were adopted by the Judicial Council as such. A description of the special findings is included in the discussion of the committee's recommendations, where appropriate.

¹⁶ The special findings reached by the advisory committee relate to the following issues:

1. The need to develop alternate means of serving process in domestic violence cases;
2. The need to mandate a waiver of filing fees in civil harassment cases involving domestic violence that does not fall within the DVPA;
3. The need to provide court protection between the expiration of an emergency protective order and the next available hearing date;
4. The need to ensure access to the courts to economically disadvantaged litigants;
5. The need to provide legal representation in domestic violence cases;
6. The need to exempt domestic violence cases from mandatory mediation of custody and visitation disputes;
7. The need to consider spousal abuse as detrimental to the best interests of the child in decisions regarding custody and visitation;
8. The need for exceptions to the legislative policy favoring "frequent and continuing contact" in domestic violence cases;
9. The need for alternatives to joint custody in domestic violence cases;
10. The need for funding for alternative visitation programs; and
11. The need for post-plea domestic violence diversion.

Note that Special Findings 2 and 3 are no longer discussed in the text of this report because they involve technical matters that were remedied by subsequent legislation.

Generally, the committee made recommendations and findings in the areas listed below.

A. PROTECTIVE ORDERS

1. TEMPORARY RESTRAINING ORDERS (TROs)

The committee developed recommendations and special findings on procedures to make TROs more readily available, simplify application forms, make court hearings safer and clearer, limit the issuance of mutual restraining orders, and limit notice and proof requirements. Sensitive to the difficulties created when a victim, children in tow, must acquaint a series of judicial officers with a story already painful to tell, the advisory committee also developed recommendations concerning direct calendaring of cases and the scheduling of hearings to coincide with hours when staffed children's waiting rooms are available.

2. EMERGENCY PROTECTIVE ORDERS (EPOs)

Statutory law provides for the issuance of emergency protective orders (EPOs) at the request of law enforcement officers,¹⁷ when the courts are closed. The advisory committee recommended extension of the time limitations in these orders, so that victims may be ensured protection until the court not only is open but also is able to issue orders.

B. ACCESS TO THE JUDICIAL SYSTEM

The advisory committee found that a number of related factors discourage victims of domestic violence from using the courts to obtain protection. Because the safety of victims may be further jeopardized by court appearances, the committee recommended procedures that take the victim's danger into account during court visits. Additional recommendations focus on ensuring adequate legal representation in family law matters and generally greater access to the courts for non-English-speaking litigants and the economically disadvantaged.

C. CHILD CUSTODY AND VISITATION

The committee proposed special findings and recommendations concerning mandatory mediation, Family Court Services procedures, standards and training for mediators, consideration of spousal abuse in custody and visitation orders, and models for alternative visitation programs.

¹⁷ Code Civ. Proc., § 546(b); now see Fam. Code, § 6250 et seq.

D. THE CRIMINAL COURTS

The committee made a special finding that domestic violence diversion should be ordered only after a guilty plea has been entered and that statewide standards for diversion programs should be promulgated by the Judicial Council with appropriate participation from other agencies.

The committee also recommended that the Judicial Council transmit this report and commend it to the attention of prosecutors, victim-witness programs, and law enforcement officers.

E. JUDICIAL EDUCATION

The committee recommended that specific programs about domestic violence be included in judicial education courses on family and criminal law.

III. METHODOLOGY

The Domestic Violence Subcommittee participated in gathering information on the treatment of victims of domestic violence by the court system in a number of different settings including five public hearings and six regional attorney meetings. Attorneys and lay advocates testified at the regional meetings on a series of subject-related questions. Judges, family lawyers, mediators, lay advocates, prosecutors, and law enforcement officers with special expertise in the area of domestic violence testified at the public hearings. Members of the public who were themselves victims of violence and one batterer also testified. This subcommittee further held three special hearings, in Los Angeles, Fresno, and Vallejo, to take testimony from three regional Coalitions Against Domestic Violence. These direct-service workers provided a wealth of information about battered women's experiences with the justice system. The committee also received written testimony from the California Women of Color Coalition Against Domestic Violence, which provided extensive commentary on the interaction between gender bias and racial and ethnic bias. And, affiliate organizations of California Women Lawyers gathered empirical data on services and procedures related to domestic violence in several California counties.

The Judges' Survey contained a comprehensive section on domestic violence that proved to be a valuable tool for evaluating other testimony. The survey's questions addressed judicial attitudes about the subject matter, judicial practices in both criminal and family law, and suggestions for education.

The committee also reviewed more than 200 letters of comment, numerous articles, studies, and surveys, and gender bias reports and recommendations from

Maryland, Massachusetts, Michigan, Minnesota, New York, New Jersey, New Hampshire, Rhode Island, and Washington. The examination of gender bias reports from other states revealed a marked similarity between this committee's recommendations and those of other task forces.

IV. RECOMMENDATIONS, FINDINGS, DISCUSSION, AND ANALYSIS

The committee's recommendations for reform are best understood against a backdrop of literature and testimony on the psychology of battered women. As a comprehensive review of the subject points out, "[B]y any standard, domestic violence must now be recognized as a pressing social and legal problem in the United States."¹⁸ Yet many fail to understand how a woman subject to domestic violence can remain in a violent home for many years without seeking help.

Laura Crites, a leading expert on domestic violence, has described some of the complex factors that lead battered women to stay. These factors include "hope that husband would reform, no place to go, fear of husband, children, financial dependence, afraid of living alone, stigma of divorce."¹⁹ Crites also credits women's low self-esteem and what Lenore Walker has labeled the "learned helplessness" syndrome. According to this theory of behavior:

Many women bring to adulthood a limited belief in their own abilities to exercise control over their lives. As they unsuccessfully attempt to reduce or stop the violent episodes, a sense of helplessness grows. After a lifetime of being reinforced for passive behavior and months or years of being unable to control the violence in their relationship, many women become convinced of their inability to stand on their own.²⁰

Batterers, on the other hand, are influenced by the following beliefs, according to Crites:

1. *It is his right to have power over his wife and violence is a legitimate means for asserting it.* This belief stems from several sources, including role modeling. The majority of battering husbands grew up in violent homes in which either they were beaten or they witnessed their mothers being abused.
2. *She deserves the abuse by not meeting his needs and expectations.*

¹⁸ *Developments in the Law: Legal Responses to Domestic Violence* (1993) 106 Harv.L.Rev. 1498, 1501 [hereinafter "Harvard Developments"]. In general, citations to or discussions of new studies or information issued subsequent to the publication of the original draft report will appear in footnotes. In this instance, however, the subject article provides an essential overview of the topic and is discussed more fully in the text of the report.

¹⁹ "Understanding Wife Abuse," *supra*, p. 8.

²⁰ *Id.*, pp. 8–9.

This stems from his patriarchal view of women and his role as head of the household. Men often say they were just teaching her a lesson.

3. *Women are inferior to men.* Abusing husbands have very traditional views of men and women that assign women to a secondary position and value males more highly than females.

4. *He needs her.* Men who abuse their wives are often desperately dependent on them psychologically. This dependency drives him to the use of abuse as a means of controlling her and assuring that she will not leave him.

5. *He will not be punished.* Because of the first three beliefs, as well as the lack of response by the police and other members of the criminal justice system, a battering husband does not believe that his violent behavior should have negative consequences.²¹

Psychologists studying domestic violence have also been able to make generalizations about the nature of the violence.²² First, the battered woman cannot control the violence through her behavior, a fact that becomes painfully clear to her over time. Second, unless forcefully checked, the violence will escalate in frequency and intensity. As Crites describes this phenomenon:

Abuse will often escalate in the following order: (1) throwing things; (2) pushing, shoving, grabbing; (3) slapping with open hand; (4) kicking, biting; (5) hitting with closed fist; (6) attempted strangulation; (7) beating up (pinned to wall/floor—repeated kicks, punches); (9) using a weapon [*sic*].

Because abuse typically escalates in this order, the presence of acts at the number 5 and number 6 level indicates a substantial history of violence and also provides those responding with a means of assessing the dangerousness of the assailant and the victim's need for protection.²³

Finally, as first documented by Dr. Walker, the author of the "learned helplessness" theory, violence occurs in a cycle:

The cycle consists of three states: first, the "tension building" period which is characterized by minor abusive incidents; second, the "acute battering" period in which the severity of the abuse and attacks escalates; and third, a "contrition stage" in which the batterer is loving and expresses remorse. The existence of such a cycle explains why so many battered women do not leave their abusers; the third phase often revives and

²¹ *Id.*, p. 9.

²² See generally, *id.*, pp. 9, 50.

²³ *Id.*, p. 9.

reinforces a battered woman's hopes that her mate may reform and thus keeps her emotionally attached to the relationship.²⁴

Of course, psychological profiles and studies alone cannot explain the epidemic of domestic violence facing this state and this nation. As one commentator put it, "[B]attering is such a common and accepted phenomenon that community values, society's general attitudes toward male-female relations, and the behavior of health and law enforcement officials must be implicated in the violence."²⁵ In short, we are all to blame and we all need to find solutions.

The complex dynamic of family violence was graphically illustrated to the subcommittee through testimony presented at the Sacramento public hearing by several participants in the trial of a woman who was prosecuted for killing her abusive husband.²⁶ The case, *People v. Blackwell* (1987) 191 Cal.App.3d 925, received widespread media attention as one of the first in the United States to invoke the battered women's syndrome as a defense to murder charges. Although the subcommittee did not make recommendations with respect to this syndrome and its legal ramifications,²⁷ the *Blackwell* case as described in hearing testimony offers several instructive lessons about community attitudes toward domestic violence.

Mrs. Blackwell had been a victim of domestic violence for a number of years. Prior to the incident that lead to her trials, she had informed medical personnel of the abuse, and she had also applied for admission to a battered women's shelter, but had been turned away for lack of space. On the night in question, Mrs. Blackwell was again abused by her husband, who then held a gun to her head and threatened to kill her. He subsequently put the gun down and left the room. Mrs. Blackwell picked up the gun and fired five shots, killing Mr. Blackwell. She was prosecuted for murder in the Napa Superior Court in 1984. In her first trial, despite expert testimony on battered women's syndrome, Mrs. Blackwell was convicted of second-degree murder and sentenced to 17 years to life in prison.²⁸

²⁴ Harvard Developments, *supra*, p. 1579.

²⁵ Lerman, *supra*, p. 65.

²⁶ Sacramento public hearing transcript, pp. 210–56.

²⁷ Battered women's syndrome "is a descriptive term that refers to the effects of physical or psychological abuse on many women. It describes the 'pattern of responses and perceptions presumed to be characteristic of women who have been subjected to continuous physical abuse by their mate.' Expert testimony on the battered woman syndrome largely consists of a description of the syndrome itself, particularly its two main components—the 'cycle theory of violence' and the 'theory of learned helplessness'"; Harvard Developments, *supra*, pp. 1578–79. Expert testimony regarding the syndrome is admissible in a criminal action in California. See Evid. Code, § 1107. In addition, in recent years, battered women's advocates have filed a number of clemency petitions with the Governor on behalf of women convicted of murdering their husbands who did not have recourse to the battered women's syndrome defense. For a description of the state of the law nationwide with respect to the defense, see Harvard Developments, *supra*, pp. 1574–97; *id.*, p. 1582. ("The trend in most states is toward admitting expert testimony on the battered woman syndrome when it is thought to be relevant.")

²⁸ Sacramento public hearing transcript, pp. 211–12.

Defendant's appeal centered on the fairness of the jury, which had included a victim of domestic violence who had perjured herself by denying any previous experience with abuse. This juror later testified that she had used her own experience with domestic violence in voting to convict Mrs. Blackwell. Because the juror was able to resolve her own abusive relationship without resorting to violence, she believed the defendant should have had a similar capacity.

The appellate court reversed the conviction and remanded for a new trial (*People v. Blackwell, supra*, 191 Cal.App.3d at 930–32). On retrial, the trial judge, assisted by counsel and skilled jury consultants, employed sensitive and probing voir dire in choosing the jury. Of the 69 prospective jurors questioned in the second trial, 70 to 80 percent had previously experienced domestic violence, either directly or through a family member; although, of the jurors selected to serve, only one had been a victim of abuse.²⁹ The second jury acquitted Mrs. Blackwell.

Napa Superior Court Judge Philip Champlin presided over both trials and was praised for his fairness and sensitivity by both prosecution and defense. He drew two important conclusions from the *Blackwell* case, which he shared with the advisory committee. First, he was struck by the utter pervasiveness of domestic violence in this society:

A surprising number of prospective jurors were either actively involved in present, or recent, battering relationships. Many more had directly experienced such relationships in the past in their own lives and it seemed like almost all had experienced domestic violence in their extended families The issue knew no boundaries based either on gender or socioeconomic status³⁰

Second, Judge Champlin observed how devastating stereotypes about domestic violence can be for its victims:

As we discovered during the selection of two juries over a four-year span, *many people feel that a battered woman can easily leave the relationship*. As this case illustrated, both men and women have this preconception, and such a preconception, if not disclosed, is now, according to the . . . Court of Appeal, presumptively prejudicial.³¹ (Emphasis added.)

²⁹ *Id.*, pp. 234–35.

³⁰ *Id.*, p. 247.

³¹ *Id.*, p. 249.

Judge Champlin praised the case for debunking this and other fallacies about battered women, including "such concepts as battered women enjoy it, or have some sort of masochistic need, or that some battering is normal in every family."³²

Blackwell demonstrates the pervasiveness of stereotypes about victims of domestic abuse, the lack of understanding about the nature of domestic violence, and the need for sensitivity to these issues on the part of all members of the judicial system. It is in the spirit of enhancing such sensitivity that the subcommittee offered the following recommendations for systemwide reform.

A. PROTECTIVE ORDERS

FINDINGS

The Domestic Violence Prevention Law (Fam. Code, § 5510 et seq.) provides for protective orders to prevent the recurrence of domestic violence. Evidence was presented, however, that victims of domestic violence are often deterred from obtaining protective orders because of procedural barriers. Most victims have no legal representation and lack the basic tools to overcome such barriers as arbitrary and severe time restrictions and substantial delays in issuing protective orders. In addition, some courts are insensitive to the physical dangers that victims are exposed to when they use the judicial system. For example, judges often require victims to be in dangerous proximity to their alleged batterers and issue orders that endanger the victim further, such as mutual restraining orders or orders for mediation before restraining orders are issued.

Lack of transportation, lack of child care, lack of financial resources, and other hardships frequently accompany domestic violence situations, particularly when the victim has had to flee her home. Yet the judicial system too often appears insensitive to victims, particularly unrepresented petitioners who are typically unfamiliar with the legal system.

These recommendations attempt to eliminate, or at least reduce, the obstacles a domestic violence victim must overcome to receive protection under the DVPL.

³² *Ibid.*

1. TEMPORARY RESTRAINING ORDERS—EX PARTE AND AFTER HEARING**RECOMMENDATION 1**

Request the Judicial Council to approve in principle and instruct staff and the appropriate committee to draft Rules of Court which would provide that:

(a) Ex parte temporary restraining orders shall be available during substantially all court hours, and emergency protective orders shall be available during all hours when an ex parte order is not available;

(b) An ex parte temporary restraining order shall be issued on the same day that the application is filed unless the application is filed too late in the day to permit effective review, in which case the petitioner shall be advised of the availability of emergency protective orders;

(c) The right to file an application for or obtain a temporary restraining order shall not be conditioned upon pursuing any other remedy, court service, or court proceeding;

(d) No applicant for an ex parte temporary restraining order shall be required to go to face-to-face mediation prior to attending the order-to-show-cause hearing regarding the application for the temporary restraining order;

(e) Each court shall devise a simplified procedure to obtain a temporary restraining order, including allowance for prompt notification that the order has been signed and that it can be retrieved from an easily accessible location;

(f) An applicant for a temporary restraining order shall not be required to type the application as a condition of obtaining the order; clearly legible handwritten applications shall be acceptable;

(g) Judicial Council forms for temporary restraining order applications shall be made available free of charge at the courthouse, and a multilingual sign shall be posted in the clerk's office, pursuant to standards developed for determining the applicable languages, indicating where the forms may be obtained and hearings held;

(h) Temporary restraining orders in domestic violence cases may be issued by a judge of a municipal or justice court³³ assigned by the Chairperson of the Judicial Council to the superior court in the county where the application for a temporary restraining order was made;

(I) No judicial officer or court shall have a policy that requires notice in all cases before issuance of an ex parte temporary restraining order, and the appropriate application form shall be amended to provide an opportunity to demonstrate good cause for lack of notice;

(j) When an ex parte change of custody or residence exclusion is granted without notice to the respondent, the court shall set an expedited hearing and shorten time for service;

(k) No court or judicial officer shall have a policy or practice that (1) automatically denies requests for residence exclusion orders; (2) applies unreasonable or arbitrary requirements for residence exclusion orders; or (3) when the judicial officer is satisfied that the applicant is in danger, requires a greater showing for residence exclusion orders than for other orders; and

(l) Support persons shall be allowed to accompany and support an applicant for a restraining order during all court proceedings, so long as they do not provide legal representation.³⁴

³³ Justice courts in California were merged with municipal courts, eff. Jan. 1, 1995 (Cal. Const. art. VI, § 5). Subsequent mention of this jurisdictional level will refer only to municipal courts.

³⁴ The recommendations set forth in this final report contain the language actually adopted by the Judicial Council on Nov. 16, 1990. The original version contained in the draft report was slightly revised by the council's internal Subcommittee on Gender Bias in the Courts. The revisions were generally technical rather than substantive.

DISCUSSION AND ANALYSIS

On its face, the DVPL provides for immediate, effective protective orders to prevent the recurrence of domestic violence. Testimony and supporting materials showed, however, that courts in various counties have, through local rules or customs, established procedural obstacles which prevent or hinder victims from taking advantage of the law. This recommendation focuses on removing many of those obstacles, so that victims may receive the full protection to which they are entitled without undue delay. The recommendation, if adopted, would also remove many inconsistencies between the counties as to how and when protective orders are issued, making the process easier to understand. Each subsection below relates to the similarly labeled part of Recommendation 1, above.

(a) Inadequate Court Availability

Courts have established various time schedules for obtaining protective orders. Testimony indicated that the hours, and even the days, during which orders are available are often severely restricted.

In one county, cases are heard four days a week, but the court only hears two cases a day. So, if the applicant for the temporary restraining order (TRO) is the third person to request an order, the matter is continued to the next day.³⁵ In another part of the state, restraining orders are issued only during one hour a day, or every other day. If an applicant misses the assigned time, he or she is required to come back later.³⁶ Testimony was heard at every hearing that applicants must miss work, juggle medical appointments, and arrange for child care to obtain court orders. Because of the possibility of imminent danger, applicants for restraining orders should be allowed to apply for and receive orders *at any time* the court is open. When the court is not open, information about emergency protective orders (EPOs) must be made available.

(b) Delay

Victims of domestic violence have been exposed frequently to substantial delays before restraining orders were issued. According to Nancy Lemon, an attorney specializing in domestic violence cases, a professor at the University of California, Boalt Hall School of Law, and co-chair of the Family Law Committee of the California Alliance Against Domestic Violence:

[T]ime can be a big problem. In some of the rural counties, they have commissioners available only one or two days a week from what I've

³⁵ Central California Coalition transcript, p. 22.

³⁶ Southern California Coalition meeting summary, p. 1 (on file at the AOC).

heard, and if you don't happen to get . . . your request for a restraining order in that day, then you may have to wait a week to get your ex parte restraining order.³⁷

Constance Carpenter, a family law practitioner with a practice focused on domestic violence victims and child custody cases, testified that she was told by a family court judge, "Well, if she's been beaten for seven years, what's the big rush for restraining orders now? Another week or two of beatings certainly can't be any big deal."³⁸

The committee received testimony that delay in issuing ex parte orders often subjects a domestic violence victim to repeated or threatened injury. It also affects the victim's ability to effect service before the hearing date. Lisa Warner-Beck, an attorney who serves as the Legal Services Coordinator for the Marjaree Mason Center in Fresno, testified that it takes at least five days to get a signed order back from the court. Warner-Beck explained, "Many times we call on a daily basis, and go down there, and we're told, oh, we—you know, it's in another department, or it's in the calendar department, or you know, we don't have it right now, you'll get it tomorrow."³⁹ And, "[W]hen we get them back, many times there [are] only two days, sometimes one day to get them served to meet the 15-day deadline for service."⁴⁰

In one county, a temporary restraining order was not issued until a week and a half after the application. Another county reported a four-to-five-day wait, and sometimes as long as seven days.⁴¹ *Delay can be devastating, as the victim remains at risk.* Murder of the victim has been attributed to delay.⁴²

Note: The safety of the applicant necessitates issuing restraining orders on the same day that the application is received. In the rare case where this is truly impossible, the applicant must be informed of the availability of emergency protective orders.

(c) Unwarranted Preconditions

Family Code section 5531(b), formerly Code of Civil Procedure section 545, specifically provides that protective orders may not be preconditioned on the filing of a petition for legal separation or dissolution. Nevertheless, testimony was received that some counties still require the applicant to file for dissolution or seek custody.⁴³ This

³⁷ San Francisco public hearing transcript, pp. 272–73.

³⁸ Sacramento public hearing transcript, pp. 177–78.

³⁹ Fresno public hearing transcript, pp. 231, 235; see also pp. 229–30, 234–35.

⁴⁰ *Id.*, p. 231.

⁴¹ Central California Coalition transcript, p. 23.

⁴² Fresno regional meeting transcript, pp. 49–50.

⁴³ Butte regional meeting transcript, p. 53; Central California Coalition transcript, p. 17; Fresno regional meeting transcript, p. 79.

requirement discourages applications for orders because of the expense and time involved, and because some victims seek an end to the violence but have not yet decided to terminate the marital relationship. The courts must allow victims access to restraining orders without imposing unnecessary procedural burdens.

(d) Referral to Mediation

Testimony indicated that several courts condition issuance of a restraining order upon a referral to mediation or conciliation.⁴⁴ Some courts take the position that they cannot issue ex parte orders that affect custody and visitation without first ordering mediation. Testimony was received at every hearing opposing the use of face-to-face mediation in domestic violence cases. Where emergency domestic violence protective orders are sought, mediation is especially dangerous to the victim, and a futile exercise that should not be required.

(e) Retrieving Signed Orders

Testimony indicated that delays in obtaining restraining orders result from cumbersome procedures which make it difficult for applicants to retrieve the orders once they are signed. In some courts, applicants are not informed of a regular location of retrieving orders and are thus unaware when an order has been signed.⁴⁵ A simple uniform procedure could rectify the situation.

(f) Handwritten Petitions

Testimony was received at every hearing that many counties do not accept handwritten petitions.⁴⁶ Many victims have no access to typewriters, and most courts do not provide them. Thus, petitioners are sometimes forced to travel by bus to another location to type their petitions. They must then return to court on another day, placing them in further danger. Provided the applications are legible, a rigid requirement that applications must be typed is unnecessary.

(g) Unnecessary Fees

Although no filing fee is required under the DVPL (Fam. Code, § 5512(a); formerly Code Civ. Proc., § 546.5), some courts charge for Judicial Council forms.⁴⁷ Such a fee puts an unintended financial burden on victims. Forms for use in obtaining protective orders should be available free of charge.

⁴⁴ See, e.g., Southern California Coalition meeting summary, p. 1.

⁴⁵ Fresno public hearing transcript, pp. 199–200.

⁴⁶ Southern California Coalition meeting summary, p. 4; Central California Coalition transcript, p. 31; Northern California Coalition meeting summary, pp. 4–5.

⁴⁷ Central California Coalition transcript, p. 31.

(h) Rural Courts

Restraining orders are issued only by superior courts. However, in rural areas, superior courts may be many miles or hours away, while justice or municipal courts are more readily accessible. Testimony from victims' advocates in rural areas described the difficulties that distance creates for battered women seeking restraining orders. The advocates suggested that the authority to issue protective orders be expanded to closer courts.⁴⁸ In rural areas, or where victims must travel more than an hour to arrive at a superior court, victims must be allowed to obtain protection from municipal or justice court judges.

(i–j) Notice Requirements

Local rules often require victims to give notice to respondents before applying for an ex parte restraining order. Victims testified that some judges were not sympathetic to the fact that such a requirement places the victim in extreme danger. Often the victim has no safe haven from the batterer after giving notice and before appearing in court. Even if the victim could move somewhere for temporary safety, such a move often requires relocating children to ensure their safety as well.

Specific testimony detailed the danger notice requirements impose on applicants. Notice requirements ranged from two hours to six hours, and at least one court "requires notice of an entire day before you go in which really puts the woman at risk to be beaten up."⁴⁹ Sometimes no excuse for the failure to give notice is accepted, not even "I am afraid I'll be killed."⁵⁰

As one advocate commented regarding a 24-hour notice requirement, "[W]e find ourselves in a position of either lying, perjuring ourselves because we don't want to notify this guy, or making a phone [call] and letting it ring once and hanging up"⁵¹

When one judge was asked where victims were to go between the time they gave notice and the time they appeared in court, the answer was that they could give notice early in the morning and then wait in the courtroom for six hours.⁵²

The committee recognized that some judges may believe that providing notice to the respondent in these cases is preferred—even though it is not required by law. However, the committee received convincing testimony that blanket notice requirements create significant risks to the safety of domestic violence victims and discourage victims

⁴⁸ Central California Coalition transcript, pp. 16–18; Northern California Coalition meeting summary, pp. 3–4.

⁴⁹ Southern California Coalition meeting summary, p. 4.

⁵⁰ *Id.*, p. 4.

⁵¹ Central California Coalition transcript, p. 15.

⁵² Southern California Coalition meeting summary, p. 9.

from pursuing their legal remedies. The committee therefore recommends that no notice should be required prior to the issuance of an ex parte TRO unless notice is ordered in a particular case upon a showing of good cause.

(k) Custody and Residence Exclusion Orders

Testimony was received that many judges are particularly reluctant to issue custody or residence exclusion orders ex parte, since they are concerned about protecting the rights of the respondent. These concerns could be addressed by permitting a respondent who challenges a custody or residence exclusion order to shorten the time for a hearing. Reluctance to issue orders awarding custody and excluding the batterer can have a devastating effect on the victim. As one battered woman's advocate testified:

This of course can put the victim in extreme danger from her abuser, particularly if she does not have anywhere else to go in the meantime. Since the TRO has not been signed yet she usually does not have court-ordered custody of the minor children, and once the abuser has notice of what she is attempting to do he will often attempt to take the children from her. . . .

It is also not fair in cases of obvious and extreme abuse or threats [that] the victim should have to leave her home and allow the abuser to remain, often allowing him time and opportunity to remove and/or destroy much of the property.⁵³

Sometimes exclusion orders are not issued at all, thereby probably allowing the batterer to remain in the same house as the victim. One judge would not issue an exclusion order because the violence "didn't happen often enough."⁵⁴ Another required three incidents of severe violence before he issued an exclusion order.⁵⁵ Another told an attorney, "We just can't kick a man out of his house because his wife says he's been beating her."⁵⁶ Some judges simply will not issue an ex parte exclusion order, which is particularly difficult for women with children and those who live in counties with no shelters.⁵⁷

For example, one judge refused to issue an exclusion order despite a woman's testimony of beatings and other abusive treatment she had received from her husband. The judge commented that the house was the husband's separate property. After the woman's attorney explained that in a temporary exclusion proceeding, the court may

⁵³ Northern California Coalition meeting summary, p. 4.

⁵⁴ Southern California Coalition meeting summary, p. 3.

⁵⁵ *Id.*, p. 4.

⁵⁶ Sacramento public hearing transcript, p. 177.

⁵⁷ Fresno public hearing transcript, p. 205. See also Butte regional meeting transcript, pp. 57, 78–83, in regional summary, p. 1.

order the batterer excluded no matter who owns the marital residence (Civ. Code, § 5102),⁵⁸ the judge said he would order the *woman* to move out in 30 days.⁵⁹

Certainly the rights of all parties should be considered in domestic violence proceedings. On balance, however, where the law provides that a residence exclusion order may be issued upon proper application, the property rights of persons who have jeopardized the physical safety of others who also reside in the home should yield pending an expedited hearing.

(I) Victims' Safety

Victims reported that they are often terrified by court proceedings, particularly when they appear in *propria persona* and must face the alleged batterer alone. They may have been living in shelters or other safe places, unable to return to their homes. This is often their first contact with the judicial system and comes at a time when they are already emotionally distraught. Representatives from domestic violence coalitions strongly emphasized that lay advocates should be allowed to accompany a victim during court proceedings to "stand between the victim and his or her abuser" (literally and figuratively), to obtain assistance from court personnel, if necessary,⁶⁰ and to provide emotional support to victims who are intimidated by their batterers.⁶¹

Respondents to the Judges' Survey were sharply divided on the issue of the appropriateness of permitting lay advocates to participate in courtroom proceedings. Of the judges responding, 56.8 percent disagreed or strongly disagreed with the following statement: It is appropriate to permit a lay advocate assisting a domestic violence victim to participate in the proceeding in ways other than as an observer in the courtroom audience.

On the other hand, 43.2 percent agreed or strongly agreed with that statement.⁶²

This divergence of views may well reflect a concern among some judges that lay persons should not function as attorneys, that is, engage in the unauthorized practice of law. To meet this concern, the advisory committee's recommendation was carefully drafted to preclude any possibility of confusion about the lay advocate's role. Support to the victim is so valuable that, in the committee's view, supportive functions such as sitting with the victim at the counsel table should be allowed provided lay advocates do not engage in the practice of law. The committee members agreed that the use of lay advocates will make the courts more accessible to victims of domestic violence.

⁵⁸ This provision has been carried over into the new Family Code in several, separate statutes. See Fam. Code, §§ 752–53, 2035(c), 2036.5, and 5751 (1994).

⁵⁹ Supplemental Summary of Orange County regional meeting, p. 1 (on file at the AOC).

⁶⁰ Central California Coalition transcript, pp. 13–14.

⁶¹ Southern California Coalition meeting summary, p. 15.

⁶² Judges' Survey, question 12b.

RECOMMENDATION 2

Request the Judicial Council to study ways to simplify the procedure for obtaining a temporary restraining order and:

- (a) Approve in principle and request staff and the appropriate committee to draft a one-page form that includes the required application, declaration, and order;**
- (b) Mandate that the form be simplified so that relevant information is clarified and written in plain language;**
- (c) Mandate that the forms be modified to meet the needs of non-English-speaking persons, including the addition of an advisement in languages other than English about the use and purpose of the form and subject to the condition that the forms are to be completed in English;**
- (d) Request simplification of the in forma pauperis form;**
- (e) Permit the forms to be handwritten or computer generated;**
- (f) Request staff and the appropriate committee to draft a revised instructional pamphlet in languages other than English as needed that more clearly explains the procedures to be followed; and**
- (g) Approve in principle and request staff and the appropriate committee to draft a form for any court with jurisdiction over criminal matters to issue a restraining order pursuant to Penal Code section 136.2.**

DISCUSSION AND ANALYSIS

The Judicial Council forms for application and issuance of domestic violence restraining orders were repeatedly criticized as cumbersome and confusing. This was of particular concern to the committee because applicants are frequently unrepresented, and they may be unduly delayed in obtaining protection if they are unable to understand or

complete the necessary forms. Deanna Jang, Legal Clinic Coordinator of the Cooperative Temporary Restraining Order Clinic in San Francisco, reported:

[E]ven though the Judicial Council forms were designed for people to go through the process on their own . . . people who are trying to do it on their own have found it very confusing, and [they] very often fall through the cracks.⁶³

It was also reported that declarations, which must be written in narrative form (there are no boxes to check to describe incidents of violence), are often rejected because they are not properly worded. For example, one woman who wrote that her batterer "hit her upside the head" was denied an order because the judge said he didn't understand it.⁶⁴ Victims were also described as "overwhelmed with the number of forms that they have to fill out."⁶⁵

The *in forma pauperis* form was described by one expert as "ridiculous," and "like doing your tax forms."⁶⁶

One witness reported that applicants often resort to paying other people to fill out their forms. One service charges \$75 for this function.⁶⁷

Dr. Susan McCain, co-principal of the Pro Se Litigant Project, Representation in Consequential Cases, a study conducted by the Department of Sociology at the University of California, Los Angeles, testified about the inadequacies of the existing information booklet approved by the Judicial Council.⁶⁸ Among the booklet's inadequacies, according to Dr. McCain, are its lack of information on the proper venue, the applicable statute, or the terms to use in describing the facts; its confusing information about the parties' parental status; and its failure to emphasize and explain how to effect proper service of a restraining order.

The need for comprehensible forms and greater access to information about the proceedings is particularly acute for applicants who do not speak English and are also unrepresented. For example, one Spanish-speaking woman applied for a protective order restricting visitation by her ex-husband when he was intoxicated. She did not know that local rules required her to set up a conciliation appointment before obtaining such an order. The commissioner who heard the petition became aggravated that she had not

⁶³ San Francisco public hearing transcript, p. 280.

⁶⁴ Southern California Coalition meeting summary, p. 14.

⁶⁵ San Diego public hearing transcript, p. 233. See also Northern California Coalition meeting summary, p. 4.

⁶⁶ San Francisco public hearing transcript, p. 288.

⁶⁷ Fresno regional meeting transcript, p. 11.

⁶⁸ Sacramento public hearing transcript, pp. 87-94; Emerson and McCain, "The Female Pro Per Litigant and the TRO," March 20, 1989, unpublished paper on file at the AOC.

made the appointment, and told her that the requirement was written right on the form, in English. The commissioner then issued an order that failed to restrict visitation.⁶⁹

Finally, restraining orders are available in criminal cases to prevent intimidation or harassment of victims and witnesses (see Pen. Code, § 136.2). However, it was reported that these orders are rarely issued, in part because no Judicial Council form had been adopted at the time this report was issued in draft.⁷⁰

As expert Nancy Lemon explained:

We have some very good statutes right now that do allow for stay-away orders in criminal cases. These are different from the civil restraining orders, TROs . . . However, they're not used very much throughout the state because we don't have a form for it.

This is a very easy recommendation. We need the Judicial Council to develop a one-page form which the judges could then be encouraged to use, and the D.A.'s could be encouraged to ask for, and the law enforcement officers would then get some training on how to enforce it, and then the law would actually be able to be implemented.⁷¹

Criminal protective orders issued under Penal Code section 136.2 would supplement, not supplant, civil restraining orders, and could be issued at any criminal proceeding where the defendant is present. A form used in Los Angeles was submitted

⁶⁹ Southern California Coalition meeting summary, p. 12.

⁷⁰ In the same year this report was issued in draft (1990), the Legislature attempted to correct this deficiency by amending Pen. Code, § 136.2 to add the following provisions:

- (g) In all cases where the defendant is charged with a crime of domestic violence, as defined in section 13700, the court shall consider issuing the above-described orders on its own motion. In order to facilitate this, the court's records of all criminal cases involving domestic violence shall be marked to clearly alert the court to this issue.
- (h) On or before July 1, 1991, the Judicial Council shall adopt forms for orders under this section.

Even prior to this amendment, the Legislature had recognized the need for restraining orders in criminal domestic violence prosecutions. Thus, in 1986, the Legislature made the following findings:

SECTION 1: The Legislature hereby finds and declares that confusion in the law has caused some courts to incorrectly exclude domestic violence cases from the coverage of protective orders issued pursuant to section 136.2 of the Penal Code.

It is the intent of the Legislature in enacting this act to ensure that courts shall issue protective, stay-away orders, under section 136.2 of the Penal Code in appropriate domestic violence cases.

The Legislature further requests that the Judicial Council shall inform each court with jurisdiction over a criminal matter of this declaration of legislative intent.

See also Stats. 1986, ch. 1183; Pen. Code, § 136.2.

⁷¹ San Francisco public hearing transcript, p. 267.

by Alana Bowman, deputy city attorney, and could be adopted by the Judicial Council for statewide use.

In sum, to the extent that the complexity of domestic violence forms or the total lack of a form keeps a victim from obtaining relief, the Judicial Council can remedy the problem and provide meaningful access to the courts. In addition, as discussed above, legible, handwritten forms should be acceptable to the court. It is further recommended that the courts accept computer-generated forms. This would enable clinics assisting unrepresented applicants to use computers to prepare and complete the forms.

RECOMMENDATION 3

Request the Judicial Council to approve in principle and request staff and the appropriate committee to draft a new Standard of Judicial Administration as follows:

- (a) The judge should begin each hearing with a description of the procedure, ground rules, and what will be expected of all parties;**
- (b) The judge should take reasonable measures to provide for the safety of all persons in conjunction with the proceedings and to obtain the necessary level of support services, including those provided by law enforcement; and**
- (c) In cases where restraining orders are granted, the judge should inform the parties orally at the hearing that violations of the orders will subject the violator to contempt proceedings and arrest and are punishable as misdemeanors or felonies.**

DISCUSSION AND ANALYSIS

Procedures for hearings on an order to show cause in domestic violence cases should reflect concern for the safety of the applicant and impress the respondent with the seriousness of the situation. Yet, testimony revealed that victims of domestic violence are often further traumatized by the hearing on their application for protective orders.

The committee heard reports that judges appear to minimize the seriousness of the violence and to "favor" the alleged batterer over the victim. Judges may fail to state

clearly the findings in support of the restraining order and fail to explain adequately the consequences of violating the court's orders.

Testimony revealed that violence is likely to continue if the court states or implies that the victim and batterer are equally to blame, when they are not. On the other hand, restraining orders are more effective if the judge makes it clear that the batterer will go to jail if the order is violated.⁷²

The tone set by the judge, the degree to which the judge explains the nature of the proceedings, and the court's expectations of both parties, all affect the ultimate effectiveness of court orders in domestic violence cases. The court's control over the proceedings can significantly reduce the trauma of the courtroom experience reported by domestic violence victims.

Attention to the safety of domestic violence victims who appear in court is also crucial. Yet, specific restrictions on a batterer's behavior to ensure the victim's safety may not be included in restraining orders. The victim's safety may be ignored in visitation orders as well. For example, some courts allow open, unrestricted visitation without seeming to realize that such an order vitiates an existing restraining order.⁷³

Victims of domestic violence also reported escalating problems when and after both parties appear in court together. The batterer may even harass the victim as they leave the courthouse or courtroom.⁷⁴ As one couple was leaving the courtroom:

The man hit the woman just outside the door and the judge ordered them both back into the courtroom for 'fighting' and declared that both would go to jail if there should be any further incident.⁷⁵

The committee heard testimony that victims are beaten, even killed, at the courthouse. To protect victims, some courts provide a bailiff-escort to the parking lot after hearings. Some issue 15-minute TROs to allow safe exit from the courthouse. Whatever the solution may be, it is tragic that anyone, much less a victim of past violence, should risk or suffer physical violence at the courthouse when seeking protection from the court.

⁷² Butte regional meeting transcript, p. 68.

⁷³ Southern California Coalition meeting summary, p. 6.

⁷⁴ Central California Coalition transcript, pp. 4, 13.

⁷⁵ Northern California Coalition meeting summary, p. 4.

RECOMMENDATION 4

Request the Judicial Council to approve in principle and request staff and the appropriate committee to draft a Rule of Court which would provide that mutual restraining orders shall not be issued either *ex parte* or after hearing absent written application, good cause, and the presence of the respondent.

DISCUSSION AND ANALYSIS

"Mutual" restraining orders are orders restraining *both* parties to a domestic violence proceeding from further acts of violence, contact, or harassment. Under established legal principles, the court lacks authority to issue a restraining order absent a showing of "a past act or acts of abuse" (Fam. Code, § 5530, formerly Code Civ. Proc., § 545). Thus, mutual restraining orders are inappropriate unless the court finds that the applicant physically abused the respondent.

Testimony revealed a widespread practice of issuing mutual restraining orders in domestic violence proceedings without proof of *both* parties' violent conduct. As one practitioner explained, in many counties, it is "almost routinely the practice to mollify everybody by just giving mutual restraining orders."⁷⁶

Responses to questions on the Judges' Survey confirm this legal error. When asked to select the circumstances under which they would issue a mutual order, 20.6 percent of the judges reported that they issue mutual restraining orders *routinely* (64.1 percent of the judges issue mutual restraining orders). When it appears that a mutual order would likely reduce the violence between the parties, only 14.9 percent selected the legally correct alternative: "only when the violence between the parties is mutual."⁷⁷

The committee heard compelling testimony about the harmful effects of this practice. First, mutual restraining orders create difficult enforcement problems. Indeed, one witness characterized such orders as "dangerous and devastating."⁷⁸ When a restraining order protects both parties equally, "the police have no way of determining who needs to be arrested, and who needs to be separated."⁷⁹ Other witnesses reported

⁷⁶ Sacramento public hearing transcript, p. 178.

⁷⁷ Judges' Survey, question 14.

⁷⁸ Sacramento public hearing transcript, p. 178.

⁷⁹ *Id.*, pp. 178–79; see also San Diego public hearing transcript, p. 232.

that police may arrest both parties or neither party when enforcing mutual restraining orders.⁸⁰

In response to a question on the survey, 70.6 percent of the judges indicated that they were unaware of enforcement problems created by mutual orders. When asked to comment on any enforcement problems perceived, 5.6 percent of the judges expressed the view that mutual orders result in settlement and enforcement is not crucial.⁸¹

Second, the committee received convincing testimony that victims of domestic violence who have not engaged in an act of violence are confused, humiliated, and degraded by orders restraining them from such conduct. As Joyce Faidley, Director of the Family Violence Prevention Center in San Diego, explained, "[M]any battered women have told us that this is humiliating and unnecessary."⁸² Other witnesses reported that mutual restraining orders give victims the message that they are being blamed.⁸³

One regional meeting speaker suggested that judges issue mutual restraining orders in a misguided effort to placate the batterer, without understanding the effects of such orders.⁸⁴ Perhaps a potentially volatile courtroom situation is diffused somewhat by issuing orders against both parties, but respect for the law is undermined.

In sum, the committee remained unconvinced that mutual restraining orders operate to reduce violence. Indeed, the testimony suggested the contrary. Because these orders create problems of enforcement and often attribute violent conduct to a party who has not engaged in violence, the committee recommended that mutual restraining orders be unavailable absent a proper showing.⁸⁵

RECOMMENDATION 5

Request the Judicial Council to approve in principle and request staff and the appropriate committee to draft new

⁸⁰ Northern California Coalition meeting transcript, p. 3; San Francisco regional meeting transcript, p. 46.

⁸¹ Judges' Survey, question 15.

⁸² San Diego public hearing transcript, p. 232.

⁸³ Butte regional meeting transcript, p. 67; San Francisco regional meeting transcript, pp. 45–47.

⁸⁴ San Francisco regional meeting transcript, p. 59.

⁸⁵ After issuance of this report in draft form, the Legislature adopted a statute clarifying the conditions under which mutual restraining orders may be issued. Fam. Code, § 5514; formerly Code Civ. Proc., § 545.4 (added Stats. 1990, ch. 935, § 4), provides:

A mutual restraining order enjoining the parties from contacting, molesting, attacking, striking, threatening, sexually assaulting, battering, telephoning, or disturbing the peace of the other party, and, in the discretion of the court upon a showing of good cause, other named persons described in subdivision (a) of section 70 may not be issued unless both parties personally appear and each party presents evidence of abuse or domestic violence. (Emphasis added.)

standards relating to calendaring of actions brought under the Domestic Violence Protection Act (DVPA) as follows:

- (a) Each court should adopt a policy that simplifies and expedites the calendaring of DVPA actions. Courts should be mindful of the needs of litigants when they develop this policy;**
- (b) Each court shall schedule domestic violence calendars at a time that staffed children's waiting rooms are available for use by children; and**
- (c) In courts with no children's waiting room or other accommodation for children, children should not automatically be excluded from the courtroom.**

DISCUSSION AND ANALYSIS

Testimony at several hearings indicated (1) that victims may be required to testify before various judges when they apply for orders, file for custody hearings, and appear at hearings or contempt proceedings; (2) that victims of domestic violence find it difficult to discuss their situation, especially in the presence of the alleged batterer; and (3) that different judges issue conflicting orders in domestic violence cases. Separate and direct calendaring of domestic violence cases would alleviate these problems and aid victims' access to the justice system.

If a judge were assigned to hear an entire case, he or she would be more likely to understand all aspects of the case,⁸⁶ ensuring that protective orders are not rendered meaningless when issues of custody and visitation are subsequently considered. Also, for unrepresented parties who are unfamiliar with the system, hearings before the same judge may offer a degree of continuity. Mary Duryee, former Director of Family Court Services for the Alameda County Superior Court, explained:

[A] federal system of calendaring, or a direct calendaring system greatly aids a family law judge in being able to see a case from beginning to end, and understand what the outcomes of various decisions are. Otherwise, what you get are decisions that are very much piecemeal and really rip families apart, and create a system in which it's very possible for people to manipulate the system . . . usually to the detriment of the children involved.⁸⁷

⁸⁶ Los Angeles public hearing transcript, pp. 244, 250.

⁸⁷ San Francisco public hearing transcript, p. 232.

As other experts in the field testified, a domestic violence calendar also "assists in making the process much less scary."⁸⁸ And, ongoing connection with a judicial officer who is knowledgeable about domestic violence will lead "to better behavior on people's parts."⁸⁹

Another significant barrier to victims' access to court is child care. The lack of available child care is a major problem for primary caretakers, usually women, who must bring their children to court. Some courts do provide children's waiting rooms, but these may be staffed solely by volunteers and are not always open. As one advocate for battered women testified, "[M]any times women end up . . . bringing their babies right into the courtroom, or they have to leave small children unattended out in the waiting room area."⁹⁰ One woman was ordered to wait outside the courtroom with her children when applying for an ex parte order. No one came out to tell her that her case was called, so "she had to leave for the weekend with no order."⁹¹ At least one court had a sign posted saying that no children were allowed in the courtrooms, but did not provide a children's waiting room.⁹² Hearings must be scheduled when a staffed children's waiting room is available in order to make access to the courts a reality for victims of domestic violence.

Special Finding 1: The need to develop alternative means of serving process in domestic violence cases. One final area restricting victims' ability to obtain results through protective orders is service of process. The committee heard testimony that unrepresented persons may not understand service requirements and lack the resources to pay someone to serve the respondent.⁹³ Inadequate service can prevent a protective order from being issued, leaving a victim unprotected.

Marshals are available to serve restraining orders, but they require a fee.⁹⁴ It is important for judges to notify low-income applicants that they can request a waiver of fees under California Rules of Court, rule 985(i)(6). (See also Fam. Code, § 5512(b) (providing for a fee waiver, upon proper showing, for service fees due to law enforcement agencies).)⁹⁵

⁸⁸ San Francisco public hearing transcript, p. 280.

⁸⁹ Los Angeles public hearing transcript, p. 250.

⁹⁰ San Diego public hearing transcript, p. 236.

⁹¹ Orange County regional meeting transcript, pp. 79–80.

⁹² Orange County regional meeting transcript, pp. 183–85.

⁹³ Sacramento public hearing transcript, pp. 90–97.

⁹⁴ Northern California Coalition transcript, p. 80.

⁹⁵ One other concern that the advisory committee included in this section of the draft report was the availability of temporary restraining orders to victims of abuse under the civil harassment statute. The committee's Special Finding 2, urging a waiver of filing fees for victims of abuse who qualified as such under the civil harassment statute but not under the Domestic Violence Prevention Act, would appear to be no longer necessary. The Legislature has now broadened the scope of domestic violence to include abuse perpetrated against a "spouse,

2. EMERGENCY PROTECTIVE ORDERS

RECOMMENDATION 6

Request the Judicial Council to approve in principle and instruct staff and the appropriate committee to draft a rule or standard which would provide a clarification of the language of Code of Civil Procedure section 546(b) such that the expiration date provided for in the statute ("not later than the close of business on the second day of judicial business following the day of its issue") will be defined as the second day after the day the order is issued when the court is in session.

DISCUSSION AND ANALYSIS

Since 1989, victims of domestic violence in most counties have been able to obtain emergency protective orders (EPOs) when courts are closed, through requests placed by law enforcement officers at the scene of a domestic disturbance to a designated duty judge (Fam. Code, § 6250 et seq.; formerly Civ. Code, § 546(b)). However, until very recently, emergency orders automatically expired at the end of the second court day after they were issued.⁹⁶ Emergency protective orders should remain in effect until a victim of domestic violence can actually obtain a restraining order in court.

In many courts, the hours and days in which restraining orders may be obtained are severely restricted, leaving a victim without protection. If temporary restraining orders are not available during all court hours, then a victim who has obtained an EPO is left unprotected if the EPO expires on the next court day because a restraining order may not be obtained on that day. This has been a particularly acute problem in rural areas. As Michelle Aiken, Executive Director of the Central California Coalition Against Domestic Violence, explained:

[I]f there's no place to go on Monday morning, or whatever, Monday through Friday morning to get a longer-lasting restraining order, the after-hours restraining order is of no use, basically.⁹⁷

former spouse, cohabitant, former cohabitant, any other person related by consanguinity or affinity within the second degree, or a person with whom the respondent has had a dating or engagement relationship" (Civ. Code, § 70; formerly Code Civ. Proc., § 542; amended Stats. 1990, ch. 752, § 2).

⁹⁶ Fam. Code, § 6256, enacted in 1993, now provides that EPOs expire at the earlier of (a) the close of judicial business on the fifth court day following the day of its issuance or (b) the seventh calendar day following the day of its issuance. Another solution, contained in the advisory committee's Special Finding 3, would be simply to extend the EPO time period until the hearing date on the temporary restraining order and stamp the EPO accordingly.

⁹⁷ Fresno public hearing transcript, p. 193.

The EPO could state on its face that the court is available to issue orders the next day. That date would also be the expiration date for the EPO. This clarification would eliminate that period of time when a victim is left without the protection of a court order.

B. ACCESS TO THE JUDICIAL SYSTEM

FINDINGS

Legal protections are worthless unless those most in need of protection have meaningful access to the courts. In addition to the specific challenges for domestic violence victims seeking protective orders, other barriers impede access to the courts. These include language and economic barriers, lack of available legal representation in family law cases, and, in some cases, the judicial system's insensitivity to safety and child-care issues.

The following recommendations and special findings attempt to improve access to the courts for all victims of domestic violence.

1. COURT SAFETY

RECOMMENDATION 7

Request the Judicial Council to approve in principle and instruct staff and the appropriate committee to draft:

(a) A Standard of Judicial Administration relating to court safety which would recommend that: (1) all courts provide training for staff on how to deal with situations involving violent persons; (2) the family law and domestic violence departments and the Family Court Services office should be equipped with metal detectors; (3) escorts to and from the courthouse to the parking lot should be provided to anyone upon reasonable request; (4) the courts should provide safe, separate and/or guarded waiting areas for all court proceedings including mediation; and

(b) A rule that requires that bailiffs shall be available for use by family law and domestic violence departments as well as in Family Court Services.

DISCUSSION AND ANALYSIS

Domestic violence cases are both emotionally charged and potentially dangerous. Numerous witnesses testified about actual incidents of violence that occurred in court. Others described having such fear that violence would recur, that they were unable to recount the facts of their case before the court. Still others said they made concessions out of fear. Courts should provide protection for victims of domestic violence to eliminate the choice between safety and access to the justice system.

Testimony about violence and the fear of violence during court proceedings was overwhelming. As explained by Mildred D. Pagelow, Ph.D., an expert in the domestic violence field:

Protection while even in the courthouse itself is very important because some women have been not only badgered and harassed in court, but we also had a case of a woman's throat being slashed right in Superior Court in Los Angeles by her disgruntled husband. And so it's a very dangerous place.⁹⁸

Mary Duryee, then director of Family Court Services for the Alameda Superior Court, also emphasized the need for protection in court: "The family law courts are one of the places of the highest degree of violence in courts . . ."⁹⁹ As she further stated in her "Security in Family Law Courts and Family Court Services: Survey Report" (1988):

Family law courts, (and by extension family court services) are as likely to experience violent behaviors from the participants as high-risk criminal courts.

The risk of courthouse violence can be devastating to battered women. One lay advocate testified:

[T]he courthouse is very intimidating and frightening. It is probably the second biggest betrayal besides the batter[y] or beating her, that a battered woman may realize that her rights are not even [protected] in this ostentatious building.¹⁰⁰

⁹⁸ San Diego public hearing transcript, p. 166.

⁹⁹ San Francisco public hearing transcript, p. 237. Others testifying about the danger inherent in these cases and the need for protection included Nancy Lemon, an attorney specializing in domestic violence cases (San Francisco public hearing transcript, pp. 273–74); Constance Carpenter, another family law practitioner (Sacramento public hearing transcript, p. 184); Michelle Aiken, executive director of the Central California Coalition Against Domestic Violence (Fresno public hearing transcript, p. 195); and Lisa Warner-Beck, legal services coordinator of the Marjaree Mason Center (Fresno public hearing transcript, pp. 236–37).

¹⁰⁰ Central California Coalition transcript, p. 5.

There are several means to reduce the risk of courthouse violence. Training for staff on how to deal with violent persons is needed. The court may also need to afford victims escorts to and from the courthouse. Specific, safe areas could be designated within the courthouse. The Judicial Council's facilities advisory committee may wish to consider these suggestions, as well as the placement of metal detectors in certain areas. A security plan would help victims and court personnel alike.

2. NON-ENGLISH-SPEAKING VICTIMS OF DOMESTIC VIOLENCE

RECOMMENDATION 8

Request the Judicial Council to refer to the Advisory Committee on Court Interpreters and the Advisory Committee on Racial and Ethnic Bias the following proposals or issues:

- (a) Legislation that would provide for qualified interpreters in domestic violence cases and which would permit the use of multilingual court employees as interpreters;**
- (b) Creation of a statewide registry of qualified interpreters; and**
- (c) Access to the courts by non-English-speaking persons.**

DISCUSSION AND ANALYSIS

Testimony indicated that victims of domestic violence who appear in propria persona are at a great disadvantage in California courts,¹⁰¹ and a disproportionate number of them are non-English speaking. As Dr. Mildred D. Pagelow testified at the San Diego public hearings, "People of color in this society are more likely to be economically disadvantaged; more people of color are likely to go into court without adequate legal representation, and they don't know their rights."¹⁰² These problems are obviously worsened if the person is also non-English speaking. Demographic trends in California indicate that lack of English proficiency will continue to be an issue for California courts.

¹⁰¹ Sacramento public hearing transcript, pp. 81–99.

¹⁰² San Diego public hearing transcript, p. 168.

Since court interpreters are not provided in noncriminal cases, domestic violence victims are at a great disadvantage. Friends who accompany the applicant may be asked to interpret, but there is no guarantee that the alleged batterer will accept such interpreters or that they are sufficiently qualified.¹⁰³ In one case, the applicant brought her own interpreter, but the judge "continued" the hearing to a future date because the alleged batterer was not willing to use that interpreter.¹⁰⁴ Asking friends or relatives to interpret is unsatisfactory, but often occurs, despite problems of accuracy and bias.¹⁰⁵ Victims suffer if their interpreter does not give them full information,¹⁰⁶ or translates inaccurately to the court. Court-paid interpreters are therefore recommended.¹⁰⁷

3. ECONOMICALLY DISADVANTAGED VICTIMS OF DOMESTIC VIOLENCE

Special Finding 4: The need to ensure access to the courts for economically disadvantaged litigants. A large number of access problems face economically disadvantaged litigants, far more than this committee could address. Of special concern, however, was testimony indicating that some child custody matters remain unresolved for long periods of time, or require lengthy waits for hearings, despite the statutory preference set forth in Family Code section 3023 (formerly Civ. Code, § 4600.6). Examples of incidents in which judges refused or were reluctant to hear child-custody disputes, despite the statutory preference, were given.¹⁰⁸

In such cases, victims of domestic violence would be far safer if their custody matters were expeditiously resolved. Those who can afford the more expeditious choice of a private judge may do so, but economically disadvantaged persons cannot.¹⁰⁹

The committee therefore requested the Judicial Council to study means for ensuring access to the justice system by economically disadvantaged victims of domestic violence, and to monitor and study the impact of the use of private judges on the criminal and civil justice system.

Special Finding 5: The need to provide legal representation in domestic violence cases. Many domestic violence victims lack sufficient resources to retain an attorney. Yet legal services offices often face overwhelming caseloads or simply refuse

¹⁰³ San Francisco public hearing transcript, p. 284; see also the report submitted by CWOCADV, on file at the AOC, p. 2.

¹⁰⁴ Fresno public hearing transcript, p. 233.

¹⁰⁵ San Diego public hearing transcript, pp. 235–36.

¹⁰⁶ Southern California Coalition meeting summary, p. 12.

¹⁰⁷ Fresno public hearing transcript, p. 236; for a statement of the need for court interpreters see also Drews, *1991–92 Public Hearings on Racial and Ethnic Bias in the California State Court System*, p. 225.

¹⁰⁸ San Francisco regional meeting transcript, pp. 12–13, 37.

¹⁰⁹ *Id.*, pp. 37–38, 41.

to accept family law cases. Domestic violence victims without representation suffer as a result. Sometimes, the judicial system favors those who are represented, by giving attorneys greater accessibility and respect. Also, unrepresented litigants often fail to understand and exercise their rights, and therefore do not receive all the protection to which they are entitled. This is particularly true when one party, typically the man, can afford representation, but the other, typically the woman, cannot. As Michelle Aiken, executive director of the Central California Coalition Against Domestic Violence, testified:

[A]ll women in California are entitled to live violence free; and therefore, if necessary, should be able to access the judicial process be it civil or criminal
Our first big [problem] is affordable and even available legal help.¹¹⁰

Women who appeared without representation reported that they were often afraid and did not understand the system. Without help, they either did not complete the forms properly or the judge did not understand their presentation of the facts.¹¹¹ This was reported to be a particular problem for minority women.¹¹²

The committee also heard testimony that judges can be impatient when parties appear without lawyers.¹¹³ One witness explained:

It's very clear there is a huge differential between the way a person representing themselves in court is treated, and the way a person with an attorney is treated [I]t's very clear that women are not treated as well as they could be if they could afford representation, and they can't afford representation in many cases.¹¹⁴

A lay advocate for domestic violence victims flatly stated, "There is a bias towards people who file pro per in the court system."¹¹⁵

Public financing for attorneys was recommended by a number of witnesses.¹¹⁶ The committee recognized the enormity of the problem and determined that lack of representation is an important element of gender bias in the family law courts, particularly for victims of domestic violence who have great difficulty representing themselves. A possible model to enhance victims' representation is the court-appointed special advocate (CASA) program used for juveniles.

¹¹⁰ Fresno public hearing transcript, p. 192.

¹¹¹ Southern California Coalition meeting summary, p. 14.

¹¹² See the report submitted by CWOCADV, *supra*, pp. 2–3.

¹¹³ Southern California Coalition meeting summary, p. 14.

¹¹⁴ *Ibid.*

¹¹⁵ Orange County regional meeting transcript, p. 78.

¹¹⁶ San Francisco public hearing transcript, pp. 274–75; Butte regional meeting transcript, pp. 72, 76.

C. CHILD CUSTODY/VISITATION**FINDINGS**

When domestic violence victims with children turn to the justice system for protection, they may encounter serious and long-term problems with respect to child custody and visitation. Whether seeking restraining orders or dissolutions, victims who have children in common with their batterers must submit to the courts for adjudication of custody and visitation issues.

At public hearings, regional meetings, and special hearings, and in written testimony, evidence showed that victims of spousal abuse are physically endangered by court orders that force them to share custody with their abusers.

In addition, every study reviewed by the committee concludes that spousal abuse is detrimental to children and must be considered a significant factor in custody decisions. The committee reviewed more than 20 studies and articles on this subject.¹¹⁷ The studies tend to show that witnessing or, in some cases, knowing about parental violence has detrimental effects on children. Those effects include depression, sleep disruption, aggressive behavior, impaired cognitive abilities, and delayed verbal development.

California judges agreed. Of the judges surveyed, 81.8 percent *strongly* agreed that spousal abuse is detrimental to children who are aware of it. An additional 17.5 percent agreed. Thus, 99.3 percent of all judges strongly agreed or agreed that spousal abuse is detrimental to children.¹¹⁸ No other question showed wider agreement among the judges who completed the survey.

Despite their near unanimity on the detrimental effect of spousal abuse on children, only 46.6 percent of the judges recognized a history of spousal abuse as a factor that would render inappropriate a custody order with nearly equal division of physical custody.¹¹⁹ This response is puzzling in light of the fact that many judges (49.5 percent) consider a high degree of conflict between the parents as a factor militating *against* an equal custody order. Obviously, the increased contact necessitated by a nearly equal sharing of custody provides an opportunity for continued spousal abuse.

As discussed below, the committee concluded that legislative and procedural reform is needed to address issues of child custody, visitation, and mediation in domestic

¹¹⁷ Examples include Gelles and Strauss, *Intimate Violence* (1988); Westra and Harold, *Children of Battered Women* (1984); Wohl and Kaufman, *Silent Screams and Hidden Cries* (1985).

¹¹⁸ Judges' Survey, question 13c.

¹¹⁹ Judges' Survey, question 27.

violence cases. The committee's proposals are set forth in Recommendation 9 and Special Findings 6–10, all of which are included in the discussion below.

1. MEDIATION

California law mandates mediation of child custody and visitation disputes (Fam. Code, § 3170; formerly Civ. Code, § 4607(a)). Traditionally, mandatory mediation means that the marital partners in a dissolution proceeding are required to meet jointly with a mediator to try and resolve their differences. However, *separate* mediation is *required* if a party protected by the DVPL so requests; and separate mediation of parties not protected by a restraining order may be *permitted* if requested and there is a "history of domestic violence" (Fam. Code, § 3177(a); formerly Civ. Code, §§ 4607(d), 4607.2).

Victims of domestic violence and their advocates testified repeatedly that face-to-face mediation is inappropriate in domestic violence cases. Testimony demonstrated, for example, that such mediation places victims at further risk of violence and intimidation, that victims make concessions during mediation out of fear, and that the severe imbalance of power in a violent relationship vitiates mediation's goal of effective resolution of the issues.

Special Finding 6: The need to exempt domestic violence cases from mandatory mediation of custody and visitation disputes. The committee heard testimony about the need for legislation or rules of court which would:

1. Exempt domestic violence cases from mandatory mediation; or
2. If mandatory mediation continues:
 - (a) provide for notice of the option provided by Civil Code section 4607(d)¹²⁰ that face-to-face mediation is not required when there has been a history of domestic violence between the parties;
 - (b) amend the existing exemption from face-to-face mediation upon the application of the victim to eliminate the requirement that a restraining order be in effect;
 - (c) provide for meeting the parties at different times and places for the purpose of determining factors to be considered in making a child-custody recommendation;

¹²⁰ Now Fam. Code, § 3181(a).

- (d) provide that the absence of one party at a Family Court Services proceeding should not delay the issuance of appropriate recommendations and orders; and
- (e) permit lay advocates to attend the mediation.

DISCUSSION AND ANALYSIS

Mandatory mediation, when domestic violence has been alleged, evokes considerable controversy. Since few other states had mandatory mediation at the time this report was first issued, literature on the subject was not extensive. However, several articles recommend against mediation in cases of domestic violence.¹²¹

Some mediators believe that mediation is preferable to litigation because they are better able to identify cases in which domestic violence has occurred than are judges.¹²²

Domestic violence advocates, however, disagree. They believe that mandatory mediation is inappropriate because of the trauma a victim experiences in being forced to negotiate with a person who has previously controlled her behavior through violence and threats. They further believe that face-to-face mediation between domestic violence victims and batterers intimidates the victim and subjects her to the risk of continued violence. Witnesses explained that the mediator's mission is to use "best efforts to effect a settlement of the custody or visitation dispute" (Fam. Code, § 3180(b); formerly Civ. Code, § 4607(a)), a goal that presupposes that both parties are operating from an equal bargaining position. They asserted that because, in domestic violence cases, the parties lack equal power, it is impossible to reach a settlement unaffected by the history of violence.

Witnesses recommended either the elimination of mandatory mediation in all cases of domestic violence or the revision of the mediation process to ensure that victims are not intimidated, taken advantage of, or further abused.

¹²¹ See, for example, Germane, Johnson, and Lemon, *Mandatory Custody Mediation and Joint Custody Orders in California: The Danger for Victims of Domestic Violence* (1985) 1 Berkeley Women's Law Journal 175, 188–89. For subsequently published sources condemning the use of mandatory mediation, see Grillo, *The Mediation Alternative: Process Dangers for Women* (1991) 100 Yale L.J. 1545, 1583 (arguing that the danger of an abuser lying is greater in the informal process of mediation); Harvard Developments, *supra*, p. 1602 (mediation in domestic violence cases is inappropriate because "effective mediation requires voluntary participation, relatively equal bargaining power, similar quality of representation, and approximately equal investment in the outcome").

¹²² San Francisco public hearing transcript, p. 235; Los Angeles public hearing transcript, pp. 243, 245.

• Eliminating Mandatory Mediation in Domestic Violence Cases

Domestic violence victims, advocates, and other witnesses strongly opposed mandatory face-to-face mediation in cases involving domestic violence. The testimony described the terror felt by victims, their inability to express themselves or assert their rights, concessions made out of fear of the batterer, and their continued victimization by being required to deal with their batterer.

Numerous incidents of violence that occurred during or were triggered by the mediation process were described for the committee. A father shot his three sons, killing one and confining another to life in a wheelchair, and then killed himself, after mediation sessions in which the mediator was not aware of the family history of violence.¹²³ In another instance, a husband physically assaulted his wife during the mediation, and the bailiff had to be called.¹²⁴ Other assaults, including a stabbing, were also reported.¹²⁵

Testimony revealed that the results reached in mediation may be influenced by fear. For example, one victim was placed in new danger after the mediator disclosed the address of the shelter where she was staying.¹²⁶ Many witnesses described how frightening it was to be in the same room or waiting area with the batterer.¹²⁷ One woman agreed to an unreasonable visitation plan that involved driving her sick baby every other day for a three-hour visit.¹²⁸ Of course, if victims are intimidated, they are often unable to tell their story fully.¹²⁹ As a lay advocate explained, "The courts are assuming that the woman and the man are coming there as emotionally equal and that is not true. She is devastated and he is strong"¹³⁰ There was also testimony that batterers have great difficulty participating in mediation, since they are used to resorting to violence to cope with stress.¹³¹

Ashley Walker-Hooper, then Acting Executive Director of the San Diego YMCA, aptly summarized the dangers of mandatory mediation for domestic violence victims:

¹²³ San Diego public hearing transcript, p. 157.

¹²⁴ Butte regional meeting transcript, pp. 58–59.

¹²⁵ Northern California Coalition transcript, p. 45.

¹²⁶ San Francisco regional meeting transcript, pp. 54–56; Southern California Coalition meeting summary, p. 8.

¹²⁷ Northern California Coalition meeting summary, p. 4; Southern California meeting summary, p. 8.

¹²⁸ Central California Coalition transcript, p. 44. For a discussion of the role of fear in mediation, see also Lerman, *supra*, at pp. 57–61; United States Commission on Civil Rights, *Under the Rule of Thumb: Battered Women and the Administration of Justice* (1982), p. 96.

¹²⁹ Southern California Coalition meeting summary, p. 8; Los Angeles regional meeting transcript, p. 54; Orange County regional meeting transcript, pp. 61, 81; see also the report submitted by CWOCADV, *supra*, p. 3.

¹³⁰ Central California Coalition transcript, p. 52.

¹³¹ San Francisco public hearing transcript, pp. 143–44.

Mothers can be pressured into accepting agreements that do not provide sufficient economic support for their children, and which give the batterers continued control over them through their children. The victims may fear future violence, or prior threats being carried out, and are likely to make concessions that could jeopardize them and their childrens' safety, well-being, and future livelihood.

The abusers, on the other hand, are able to exert control and domination by signals recognizable only by the subordinate party. Gestures, such as a clenched fist, jaw, frowns, subtle body language, or certain phrases. This is victim intimidation

Although many mediators believe they can equalize the power disparity between the parties, no amount of interpersonal skill on their part can do so when violence has occurred in relationships. The mediator's goal is to get the parties to sign an agreement, and sometimes they exert pressure on a recalcitrant party to agree.

Even the most sensitized mediator cannot be expected to identify and interpret the subtle innuendo of threat or coercion exerted by an abuser who draws on years of experience at domination and control, nor the inner terror of the victim

*Mediation is always inappropriate when dealing with victims of violence [It] trivializes domestic violence and does not treat it as the real crime that it is, or acknowledge the severe and lifelong impact it has on women and children. You cannot mediate an unequal power relationship.*¹³² (Emphasis added.)

Dr. Mildred D. Pagelow, an expert in the field, testified:

Mediation is based on two assumptions: One, that the parties come to negotiations with relatively equal bargaining powers; and two, that they

come together with the mediator or mediators voluntarily. Neither assumption is met when a couple with a violent history is mandated into mediation.¹³³

Dr. Pagelow warned the committee that gains women have made in the legal system are being undercut by the present attitude that mediation is "the panacea for reducing the backlog of court cases and for resolving cases more expeditiously."¹³⁴ She

¹³² San Diego public hearing transcript, pp. 162, 163, 179.

¹³³ *Id.*, p. 161.

¹³⁴ *Id.*, p. 160.

agreed with Hugh McIsaac, Director of Family Court Services for Los Angeles Superior Court, that mediation is not appropriate for very intense forms of domestic violence:

A former wife abuser and a formerly battered wife are on no more equal footing than a rapist and a rape victim, and no one would expect them to negotiate future behavior together.¹³⁵

- **Suggestions for Improvement in Mandatory Mediation**

The argument for eliminating mandatory mediation in all cases of domestic violence is compelling. However, even if mediation continues to be mandatory, there are a number of ways it can be improved to be more sensitive to the needs of the domestic violence victim:

1. Mediators should provide notice to the parties of the separate mediation option. Although California law provides that face-to-face mediation may be excused in cases of domestic violence, victims often do not know they may request separate mediations. As Constance Carpenter, a family law practitioner, testified:

The Legislature has recognized the problem of domestic violence victims in mediation, and has provided that in mediation domestic violence victims can request that the mediator meet separately with them and their batterer when discussing the children.

However, the way it works in my county is that . . . no one tells the women they have this option. So unless you happen to be represented by me, or somebody who knows this, you have no way of knowing you have the right to ask for this option.

And even more ridiculous, I discovered, was that the appointments are made at the same time, so that when the batterer and the victim show up for their separate mediation appointments, they wait outside in the hallway together.¹³⁶

2. Mediators should make separate mediation available even when no restraining order is in effect. Separate mediation is required if a party protected by a restraining order so requests, but since it is available whenever there is a history of domestic violence, the absence of a court order should not be used to deny separate mediation.

¹³⁵ *Id.*, p. 163.

¹³⁶ Sacramento public hearing transcript, p.183. Note that the new Family Code provides for notice of the separate mediation option on family court services intake forms. See Fam. Code, § 3181(b).

3. A domestic violence victim should also have the option of separate mediation conducted at a different time. Meeting with the parties separately would obviously reduce the danger created by requiring the parties to be in the same waiting room, office, hallway, or parking lot at the same time.¹³⁷
4. Delay in mediation proceedings should be reduced. Testimony indicated that mediators sometimes reschedule a mediation session if the batterer fails to attend,¹³⁸ thereby prolonging a dangerous situation. An obvious solution is to deny the batterer the opportunity to reschedule.
5. Lay assistance for battered women in mediation can provide needed support. As one expert stated, "Battered women are often poorly equipped to assert their own needs, especially in the presence of the abuser."¹³⁹ The use of lay advocates, not to provide legal representation but instead to provide support to the victim, was strongly recommended by many witnesses.¹⁴⁰ As other experts testified at the hearings, "The advocate can assist the woman in telling her story to the mediator,"¹⁴¹ and "[A]n advocate will advise a woman when she buckles under [from] fear and intimidation not to settle for less than she is legally entitled to."¹⁴² Since meaningful access to the justice system must include a real ability to participate and represent one's own interest, providing for the special needs of domestic violence victims through lay advocates is essential. The need for lay advocates is particularly critical because mediators are allowed to exclude counsel from the mediation process (Fam. Code, § 3158; formerly Civ. Code, § 4607(d)).

RECOMMENDATION 9

Request the Judicial Council to approve in principle and request staff and the appropriate committee to draft Standards of Judicial Administration that would:

(a) Define the role of Family Court Services in domestic violence cases as an in-house system that provides the following services: (1) identifies cases that involve domestic

¹³⁷ *Ibid.* See Fam. Code, § 3181(a).

¹³⁸ Northern California Coalition meeting summary, p. 4.

¹³⁹ Lerman, *supra*, p. 91.

¹⁴⁰ Northern California Coalition meeting summary, p. 2; Southern California Coalition meeting summary, p. 15.

¹⁴¹ Los Angeles public hearing transcript, p. 247.

¹⁴² San Diego public hearing transcript, p. 179.

violence and codes the files to identify such cases; (2) makes appropriate referrals; (3) assures the safety of the victim and other parties; (4) assesses the facts surrounding the allegation of domestic violence; the possibility of the abuser's rehabilitation; the parent/child relationship with each parent and child; and the safety of children with each parent; and (5) provides for these services free of charge;

(b) Establish minimum statewide standards for mediators regarding training, qualifications, protocols, and procedures for dealing with situations involving domestic violence, and that would prohibit counties from charging for their services; and

(c) Instruct the Family Court Services Program to provide ongoing training to all personnel on issues related to domestic violence including: (1) the cycle of violence and issues of safety; (2) the necessity for confidentiality of the victim's address; (3) issues affecting women as victims; (4) issues affecting men as victims; (5) avoiding preconceptions and judgments regarding the victim; (6) the need to understand the judicial process; (7) issues of equality and inequality in bargaining power; and (8) the risk that strict neutrality, that is, treating both parties the same, disadvantages victims of domestic violence.

DISCUSSION AND ANALYSIS

There are other, serious problems that must be addressed in mediation of cases involving domestic violence. Recommendation 9 focuses on the role, standards of behavior, and training of the mediator.

At the time of issuing this report in draft, no qualifications or professional standards for mediators were in existence.¹⁴³ Programs appeared to vary greatly from county to county, with varying degrees of success. Minimum standards are necessary to ensure that family court services programs operate at a professional level, and that

¹⁴³ Uniform standards of practice were formulated, eff. Jan. 1, 1991; see Standards of Jud. Admin., § 26. Further, legislation that would require family law mediators to receive training in the avoidance of gender bias as it relates to the mediation of custody disputes is pending and generally supported by the Judicial Council.

mediators are qualified to deal effectively with cases involving a history of domestic violence.¹⁴⁴

The committee heard repeated testimony in support of training family court mediators on domestic violence issues. The Director of Family Court Services for Los Angeles' Western District explained, with regard to the work of another task force:

[T]hose who were working in the domestic violence field did not have a thorough knowledge of the family law system and those working within the family law system didn't have enough knowledge of the subtle issues involved in domestic violence [W]e can't wait for the victim to announce the victimology [W]e have to be educated as to the subtle cues that exist.¹⁴⁵

Another witness emphasized that education is required to accomplish "a change in attitude of many court personnel, including mediators, away from the fiction of dealing neutrally with parties of relatively equal strength, into assuming a proactive stance resulting [in] a redistribution of power into some semblance of equality."¹⁴⁶

Testimony also revealed that some family court mediators show an inadequate understanding of domestic violence issues. One witness contrasted how mediation handles allegations of spousal abuse with how it addresses allegations of child abuse.¹⁴⁷ The latter are investigated immediately and fully, the former are not investigated at all. Witnesses reported that some mediators do not even consider spousal abuse relevant to the issues of custody and visitation.¹⁴⁸

One victim testified that her mediator did not care about her restraining order, denied her request for separate mediation, refused to return telephone calls, canceled appointments, failed to recognize that her ex-spouse was manipulative and controlling, and, in dealing with visitation, said, "Even murderers get to see their children once a week."¹⁴⁹ According to battered women's advocates, mediators "don't take into consideration the violence in the home."¹⁵⁰ One mediator told a victim's advocate that "battering is not our job."¹⁵¹

¹⁴⁴ As a model, see Kuehl and Lerman, *Mediators' Response to Abusive Men and Battered Women: Guidelines for Policymakers and Mediators*, U.S. Dept. of Justice National Women's Abuse Prevention Project.

¹⁴⁵ Los Angeles public hearing transcript, pp. 240, 244.

¹⁴⁶ San Diego public hearing transcript, p. 165.

¹⁴⁷ *Id.*, pp. 157–58.

¹⁴⁸ Orange County regional meeting transcript, pp. 60–61.

¹⁴⁹ *Id.*, p. 307.

¹⁵⁰ Southern California Coalition meeting summary, p. 8; see also San Francisco regional meeting transcript, p. 54.

¹⁵¹ Northern California Coalition transcript, p. 27.

It was also reported that some mediators were unaware of the need to protect the victims by keeping addresses confidential.¹⁵² When training on domestic violence was proposed for mediators in one county, it was resisted because "there would be a backlash from men's rights groups."¹⁵³

Some mediators, however, spoke convincingly of the role Family Court Services can play in assisting families with a history of domestic violence. As the former Director of Alameda Superior Court's Family Court Services testified: "Very often . . . the court mediators are the first identifiers of these [domestic violence] cases and discover the violence between the couple and are the referrers to resources in the community. . . ."¹⁵⁴ Family Court Services could "identify victims of domestic violence when they enter the system, and as many do, they come in pro per. So that a process of victim protection, education, and advocacy is automatically initiated"¹⁵⁵ Los Angeles has developed such a protocol, which could be adopted statewide. Mediators could also arrange services for victims, such as bailiff escorts and separate waiting areas.

If Family Court Services is to assist victims of domestic violence in reaching a fair resolution of custody and visitation disputes, and not merely an expeditious settlement, then in-depth training of family court personnel is imperative. Such training should stress active intervention in cases involving domestic violence. As summarized by one commentator:

Mediation is a quasi-legal and quasi-therapeutic process; mediators therefore need both the skills of a legal advocate and those of a therapist. These include (1) techniques for identifying battering cases; (2) techniques for counseling victims and abusers; (3) knowledge of local laws, and of law enforcement and court practices regarding domestic

violence; (4) awareness of legal, mental health, and other services for people in violent relationships; (5) awareness of collateral services, such as treatment programs for alcoholics or public benefits programs; and (6) a general understanding of political, psychological and sociological perspectives on wife abuse.¹⁵⁶

¹⁵² San Francisco regional meeting transcript, pp. 55–56.

¹⁵³ Northern California Coalition transcript, p. 44.

¹⁵⁴ San Francisco public hearing transcript, p. 235.

¹⁵⁵ San Diego public hearing transcript, p. 165.

¹⁵⁶ Lerman, *supra*, p. 111; see also *id.*, pp. 100–06 (setting forth specific goals for mediation and procedures for mediators to follow both before and during the mediation).

2. CUSTODY AND VISITATION ORDERS

As discussed in Special Findings 7 through 10, below, the committee strongly encourages the adoption of legislation requiring judges to consider spousal abuse as detrimental to the best interests of children when making custody decisions. These findings are consistent with a comprehensive study of domestic violence trends nationwide, which calls for states to follow Louisiana's lead in adopting a legislative presumption that a parent with a history of perpetrating family violence should be considered unfit.¹⁵⁷ Gender bias task forces in New York and Maryland reached the same conclusion. These findings are premised upon thorough and complete statistics on the detrimental effects of spousal abuse on children, effects which the advisory committee hearing testimony strongly corroborates.

Special Finding 7: The need to consider spousal abuse as detrimental to the best interests of the child in decisions regarding custody and visitation. At the time this report was first issued, no California statute contained an express statement that spousal abuse should be considered in determining custody or visitation arrangements in a child's best interests.¹⁵⁸ As the Judges' Survey clearly shows, while domestic violence is sometimes considered in custody and visitation decisions, too many times it is not.¹⁵⁹

Dr. Pagelow aptly summarized the issue:

When a case enters the system with allegations of child abuse, state law mandates investigation before custody determinations are made to protect the best interests of the child. This is not so in the case of allegations of spouse abuse, and the guilt lies with the Legislature for failing to provide such a statute.

Although some have tried, bill after bill has failed to become law, because a few legislators insist that while child abuse undeniably injures, harms a child, spouse abuse does not.

In other words, they believe that there is no injury to a child when one parent beats another. This ludicrous idea has been soundly refuted by solid research evidence, many case histories, and systematic observations.¹⁶⁰

Repeated studies demonstrate that spousal abuse and other forms of domestic violence have a devastating effect on children. Dr. Robert Pynoos, Director of the

¹⁵⁷ Harvard Developments, *supra*, pp. 1608–11, 1612.

¹⁵⁸ Fam. Code, § 3011(b), now includes among the factors to consider in determining the best interests of the child "[a]ny history of abuse by one parent . . . against the other parent."

¹⁵⁹ Judges' Survey, question 27.

¹⁶⁰ San Diego public hearing transcript, pp. 157–58.

Program in Trauma, Violence, and Sudden Bereavement at the UCLA Center for Preventive Psychiatry, has studied children who witness violence. He described to the committee the profound effects, both long-term and immediate, of domestic violence on children. The long-term effect is "the intergenerational transmission of abuse," with such children becoming either victims of abuse or abusers as adults in their own marital situation.¹⁶¹ As Laura Crites has observed, "[U]p to 80 percent of men who abuse their wives were victims of violence or witnessed the abuse of their mothers."¹⁶² She further concludes that children who witness violence are those children most at risk of being homicidally aggressive adolescents and adults.¹⁶³

The danger of causing violent adult behavior in a child who has witnessed domestic violence was also described by Dr. Pagelow, who said:

Probably the most profound effect of domestic violence on children is the message that violence is what adults do when they're angry or upset, and this is most likely to be learned and carried into adulthood by boys who witnessed their same-sex role models abuse their mothers.¹⁶⁴

Lieutenant Leslie Lord, Domestic Violence Liaison Coordinator for the San Diego Police Department, echoed these concerns:

The one thing we do know is that violence is a learned behavior. That . . . comes home to me every time when I go out in the field, and I cover . . . these calls, and I walk in, and I see little faces with very big eyes

watching. And what it does for me is it makes me wonder, where is our future, and quite candidly, what is the future that I'm going to be seeing for my own children.¹⁶⁵

The more immediate effect of witnessing violence is post-traumatic stress disorder (PTSD). This disorder has a "major impact on a child's normal development," restricting his or her emotional life and brain development.¹⁶⁶ As Dr. Pynoos testified, children who have witnessed violence continue "to have intrusive images of that kind of violence" and

¹⁶¹ Los Angeles public hearing transcript, p. 196.

¹⁶² Understanding Wife Abuse, *supra*, p. 5.

¹⁶³ *Id.*, pp. 5–6; see also Harvard Developments, *supra*, pp. 1608–10.

¹⁶⁴ San Diego public hearing transcript, p. 159.

¹⁶⁵ *Id.*, p. 223.

¹⁶⁶ Los Angeles public hearing transcript, p. 198. The American Psychiatric Association defines post-traumatic stress disorder as resulting from "a serious threat to one's life or physical integrity; or harm to one's children, spouse or other close relatives and friends; . . . or seeing another who has recently been, or is being, seriously injured or killed as the result of . . . physical violence. In some cases the trauma may be learning about a serious threat or harm to a close friend or relative"; American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (3d Ed. Rev.) (1987), pp. 247–48.

experience feelings of being "very anxious and afraid" and "helpless."¹⁶⁷ One mother reported to the committee that her child was substantially overweight as a result of witnessing domestic violence, and "[t]hat's insulation. She's protecting herself, her therapist even says that."¹⁶⁸

It was also reported that there is a strong likelihood of child abuse in families where there has been spousal abuse. "We know that 50 percent of the children in marriages in which there is spouse abuse, are also abused," according to Susan Hanks, Director of the Family Violence Institute in Berkeley.¹⁶⁹ And even if child abuse did not occur while the spousal abuse was occurring, it may begin afterwards. As one witness testified: "[S]ome abusive fathers who have lost control over their wives transfer the control and abuse to their children"¹⁷⁰ As a family law practitioner explained, "A person who has been violent towards his wife is going to lash out at the next person who annoys him, and it's probably the child"¹⁷¹

Despite the overwhelming evidence that domestic violence adversely affects children, domestic violence is too often not considered in custody or visitation decisions. One advocate reported that a judge who refused to consider spousal abuse said, "I am concerned about the children's interest, not yours."¹⁷² The committee members agreed that spousal abuse should be considered in determining the best interests of the child.

Special Finding 8: The need for exceptions in violence cases to the legislative policy favoring frequent and continuing contact. A related topic is California's existing public policy favoring frequent and continuing contact between children and both parents after marital dissolution. Current law establishes a policy that children be assured "frequent and continuing contact with both parents" (Fam. Code, § 3020; formerly Civ. Code, § 4600(a)). The committee received evidence supporting the need for exceptions to this policy when spousal abuse has occurred. In families with a history of domestic violence, it was reported that "frequent and continuing contact" often provides the batterer additional opportunities for spousal abuse and, as discussed above, can endanger the child.

Witnesses testified that "the policy requiring the child's close and continuing contact with both parents has no doubt provided in some cases ongoing opportunities for further intimidation, harassment, and/or physical assaults of the battered woman."¹⁷³ In cases of domestic violence, there should be an exception to a presumption favoring

¹⁶⁷ Los Angeles public hearing transcript, pp. 198–99.

¹⁶⁸ *Id.*, p. 125.

¹⁶⁹ San Francisco public hearing transcript, p. 142.

¹⁷⁰ San Diego public hearing transcript, p. 159.

¹⁷¹ Sacramento public hearing transcript, p. 180.

¹⁷² Southern California Coalition meeting summary, p. 5.

¹⁷³ San Francisco public hearing transcript, p. 143.

continuing contact, and "it should be up to the judge to decide whether frequent and continuing contact is really in the best interests of that child in that situation."¹⁷⁴ "[F]requent and continuing contact as required by the Civil Code should be an ideal to be worked towards, not a starting point."¹⁷⁵

Special Finding 9: The need for alternatives to joint custody in domestic violence cases. The committee also received testimony that joint custody is inappropriate when there has been domestic violence by one parent against the other, and that the court should instead consider options such as alternative visitation arrangements or, in some cases, no visitation at all. Although joint custody is always an option, custody is to be awarded according to the child's best interests (Fam. Code, §§ 3022, 3040; formerly Civ. Code, § 4600(b)(1)). While there is no legal preference for joint custody (Fam. Code, § 3040(b); formerly Civ. Code, § 4600(d)), some judges may continue to prefer it. But, since joint custody requires cooperation between the parents, witnesses recommended that it be presumed inappropriate in domestic violence cases. A better approach would be to require a specific finding that joint custody was appropriate despite the history of domestic violence.

As Joyce Faidley of San Diego's Family Violence Prevention Center testified, "[M]any women express fear and concern at having to share child custody with a man who has physically abused them. Supervised visitation . . . is not taken seriously by judges when they request it."¹⁷⁶ One family law practitioner described joint custody as "a crime against children in [cases] where there has been domestic violence."¹⁷⁷ The practitioner based this conclusion upon the assumption that violence to the mother endangers the children. Still another practitioner recommended "a presumption against joint custody, or sole custody to the batterer if there's been a history of domestic violence."¹⁷⁸

Finally, a mother who had been a long-time victim of domestic violence and later became Executive Assistant to the Los Angeles Children's Services Commission, testified that although joint custody may work well when the two parents get along, for her it had been a nightmare:

¹⁷⁴ *Id.*, p. 269.

¹⁷⁵ *Id.*, p. 145.

¹⁷⁶ San Diego public hearing transcript, p. 233.

¹⁷⁷ Sacramento public hearing transcript, p. 180.

¹⁷⁸ San Francisco public hearing transcript, p. 269.

[C]ustody orders . . . expose you to harm at all times. You're at the child's school, he's there. You're at extracurricular activities, he's there. You're at the doctor appointments . . . and he will be there. Do you know what it's like, to be there standing next to the guy who beat your face purple, and you can't protect yourself?¹⁷⁹

Special Finding 10: The need for funding of alternative visitation programs.

The committee heard testimony supporting the need for alternative visitation programs that ensure the safety of victims of spousal abuse and their children when the court orders shared custody or visitation. A common supervised visitation arrangement may involve supervision by a relative, an option not always available to the victim of domestic violence.

The committee was told that during the "cycle of domestic violence," victims become isolated from a support system of friends or relatives, and that often the batterer's mother is the victim's only permitted outside contact. When victims finally decide to initiate a custody proceeding, they may request third-party, or supervised, visitation in order to try to protect themselves and their children from the danger posed by the batterer. But often, because of their isolation, victims do not have people to rely upon to supervise the exchange or visitation of children. As Professor Lerman of the California Alliance Against Domestic Violence testified, "[P]art of the whole cycle of domestic violence involves cutting off—the batterer cutting off the woman's support system, her friends, her relatives, etc. So a lot of times there's nobody available to supervise that visitation."¹⁸⁰ It was reported that women who are poor, women of color, and immigrant women often lack access to sufficient resources to provide an adequate supervisor,¹⁸¹ and that many battered women have great difficulty arranging for a safe location to transfer their children to the father under court-ordered visitation.¹⁸² In sum, if the burden is placed on the abused person to obtain supervision, safe and satisfactory arrangements are often not available.

Witnesses recommended the creation of supervised visitation programs available to all persons, whatever their income, similar to the Creative Visitation program designed by the YWCA in San Diego. However, these programs can be expensive and often rely upon grants to supplement sliding-scale fees.¹⁸³ One pilot program undertaken in Santa Clara, under a grant from the Judicial Council, uses senior centers to provide supervised visitation.¹⁸⁴ The committee concluded that public funding of visitation programs is desirable.

¹⁷⁹ Los Angeles public hearing transcript, pp. 122, 125.

¹⁸⁰ San Francisco public hearing transcript, p. 270.

¹⁸¹ *Id.*, p. 282.

¹⁸² San Diego public hearing transcript, pp. 175–76.

¹⁸³ *Id.*, p. 176.

¹⁸⁴ *Santa Clara Gets Pilot Child Visitation Program* (May 24, 1989) *The Recorder*.

D. CRIMINAL PROSECUTION

FINDINGS

Today, there is a growing trend in support of increased arrest and prosecution in domestic violence cases. This trend began with the 1984 United States Attorney General's Task Force on Family Violence. As expert Laura Crites has recognized, "Domestic violence is a crime and treating it as such will have a deterrent effect on individual acts of violence against women and children."¹⁸⁵

The criminal court system can remove a batterer from proximity to a victim and demonstrate society's disapproval of the batterer.¹⁸⁶ Studies have documented decreased violence following arrest of the abuser.¹⁸⁷

The Legislature has recognized the importance of placing domestic violence within the criminal justice system, beginning with its 1984 adoption of the Law Enforcement Response to Domestic Violence Act. The Legislature declared the purpose of the act as follows:

to address domestic violence as a *serious crime* against society and to assure the victims of domestic violence the maximum protection from abuse which the law and those who enforce the law can provide. It is the intent of the Legislature that the official response to cases of domestic violence shall stress the enforcement of the laws to protect the victim and shall communicate the attitude that violent behavior in the home is criminal behavior and *will not be tolerated*.¹⁸⁸ (Emphasis added.)

As this act recognizes, prosecutors and police are the frontline in carrying out the Legislature's intent that domestic violence be treated seriously. (See Recommendations 11 and 13, below.)

The following section addresses ways to improve the criminal justice system's response to domestic violence in four critical areas: (1) diversion, (2) district and city attorneys, (3) victim/witness assistance programs, and (4) law enforcement officials.

¹⁸⁵ "Understanding Wife Abuse," *supra*, p. 50; see also Lerman, *supra*, p. 70 (describing conciliation and law enforcement responses to domestic violence; the latter approach, espoused by battered women and an increasing number of court officials, police officers, and others, and "advocates formal legal action combined with punishment or rehabilitation of wife abusers. The goal is to ensure the safety of the victim and to give the abuser a clear message that society will not tolerate his continued violence against his mate"); Harvard Developments, *supra*, pp. 1521–23. ("Criminal prosecution should receive the greatest emphasis of all substantive approaches to domestic violence. . . . On a societal level, domestic violence is so widespread and destructive that an energetic criminal response is indispensable.")

¹⁸⁶ Goolkasian, *supra*, p. 7.

¹⁸⁷ See, e.g., Lerman, *supra*, p. 81.

¹⁸⁸ See Preamble to Pen. Code, § 13700 (1984).

1. DIVERSION

Special Finding 11: The need for post-plea domestic violence diversion. Penal Code section 1000.6 provides for diversion, under specified circumstances, of defendants accused of spousal abuse. Diversion means a defendant is sent to counseling and treatment programs as an alternative to further prosecution. Upon completion of a diversion program, the defendant's record is expunged (Pen. Code, § 1000.10). Several models of effective, diversion treatment programs were presented to the committee.¹⁸⁹

The committee heard testimony that the availability of diversion sends a message that domestic violence is treated less seriously than comparable crimes against nonfamily members. As one family law attorney put it:

It makes no sense to me that if my law partner beats the hell out of me, he's not eligible for diversion, but if my home partner beats the hell out of me, he can be diverted and not serve a day in jail, and have the case later dropped. And if diversion, in fact, is reasonable for domestic violence crimes, to me it is reasonable for other crimes, and I find that simply another example of the fact that domestic violence is just not taken as seriously as other violence.¹⁹⁰

Alana Bowman, a Los Angeles Deputy City Attorney with extensive experience in prosecuting domestic violence cases, called diversion "an obstacle to the full prosecution of domestic violence cases," and noted that "[t]he injuries in diverted cases have included swollen eyes, detached retinas, loose teeth, broken noses, and in many cases, threats to kill the victim."¹⁹¹ As Bowman stated, "Counseling alone is usually not enough in these cases."¹⁹²

It was reported that some courts use diversion to reduce their caseload, and that court review of a defendant's failure to complete diversion is inadequate. Moreover, by the time a failure to complete diversion is discovered, requiring the defendant to stand trial, the prosecution is rarely successful due to the passage of time. Testimony also revealed that although probation departments have statutory responsibility to investigate diversion programs, heavy caseloads generally prevent much investigation,¹⁹³ few programs report batterers who fail to show up,¹⁹⁴ and communication is lacking between domestic violence diversion programs and other programs such as drug diversion.¹⁹⁵

¹⁸⁹ See Ganley, "Perpetrators of Domestic Violence: An Overview of Counseling the Court-Mandated Client," in *Domestic Violence on Trial: Psychological and Legal Dimensions of Family Violence*, ed. by D. Sonkin (1986).

¹⁹⁰ Sacramento public hearing transcript, p. 187.

¹⁹¹ Los Angeles public hearing transcript, p. 265.

¹⁹² *Ibid.*

¹⁹³ *Id.*, pp. 274–75.

¹⁹⁴ *Id.*, p. 267.

¹⁹⁵ Butte regional meeting transcript, p. 60.

In fact, too often batterers do not treat diversion seriously. As Gail Pincus, Director of the Northridge Domestic Abuse Center, testified, "Batterers know there is no follow-up. They will show up once, if they show up at all. [B]atterers batter because there are no consequences."¹⁹⁶ A former batterer explained it this way: "Batterers feel they can get away without any consequences."¹⁹⁷ Batterers see diversion as a way to "con" the system and avoid jail.¹⁹⁸

Testimony was received linking the availability of domestic violence diversion programs and gender bias. According to Deputy City Attorney Bowman, "[D]omestic diversion exists because of a bias against women who are the victims of these crimes."¹⁹⁹ Moreover, she testified, "[D]iversion is seen as a valid method of dumping these cases by prosecutors and by judges."²⁰⁰ In summary, the committee received significant testimony that diversion can constitute an alternative to taking the crime of domestic violence seriously.

Witnesses recommended that diversion be a condition of probation *only after* a plea of guilty.²⁰¹ This, they said, would send a clear message that domestic violence is a serious matter and that failure to complete diversion will result in criminal penalties. After a plea, "[I]f the batterer reoffends by beating the woman again, or misses the counseling sessions, . . . the counselor has to call the probation officer . . ." and probation can be revoked.²⁰² Post-plea diversion would provide greater safety for the victim, protecting him or her from re-violation by giving time "to get her act together, or to get out of town safely, or to establish [a] safer relationship with him."²⁰³

Finally, the committee heard testimony that when batterers plead guilty and go to diversion as a condition of probation, there is a far higher rate of program completion.²⁰⁴ As Ms. Pincus explained:

[O]ur batterers will do absolutely anything to stay out of that jail. If that means coming to my program and stop violating her, that's what they're going to do.²⁰⁵

¹⁹⁶ Los Angeles public hearing transcript, pp. 289, 292.

¹⁹⁷ *Id.*, p. 298.

¹⁹⁸ Los Angeles regional meeting transcript, p. 59.

¹⁹⁹ Los Angeles public hearing transcript, p. 266.

²⁰⁰ *Id.*, p. 267.

²⁰¹ San Diego public hearing transcript, p. 199; Los Angeles public hearing transcript, pp. 267, 290.

²⁰² San Francisco public hearing transcript, p. 265.

²⁰³ Los Angeles public hearing transcript, p. 291.

²⁰⁴ San Diego public hearing transcript, p. 197.

²⁰⁵ Los Angeles public hearing transcript, p. 291.

A former batterer agreed, stating flatly that "batterers do not under any circumstances want to go to jail."²⁰⁶

Therefore, a guilty plea should be required as a condition of eligibility for diversion, so that a clear and serious message is sent that failure to complete diversion will result in criminal penalties.²⁰⁷

RECOMMENDATION 10

Request the Judicial Council to approve in principle and instruct staff and the appropriate committee to draft a Rule of Court that would create statewide standards for diversion programs, with input from those knowledgeable about domestic violence and advocates for domestic violence victims, and statewide standards for effectively monitoring participation and successful completion of diversion programs.

DISCUSSION AND ANALYSIS

Diversion programs now vary greatly from county to county and lack any consistent, statewide procedural or operational standards. In January 1990, the California Auditor General issued a report entitled *The Administration of the State's Domestic Violence Diversion Program Could Be Improved*. The report's three major findings were that:

1. The probation departments in the counties reviewed are not adequately monitoring their domestic violence diversion cases;
2. Defendants in domestic violence diversion sometimes attend inappropriate treatment programs and programs that consist of only a few treatment sessions; and
3. Courts are granting domestic violence diversion to some defendants who are not eligible.²⁰⁸

²⁰⁶ *Id.*, p. 298.

²⁰⁷ Harvard Developments, *supra*, p. 154: "Because diversion to counseling programs channels domestic violence cases away from the criminal justice system, this option should be available only *after* an adjudication or an admission of guilt—as an alternative to sentencing or as a condition of probation."

²⁰⁸ Report by the Auditor General of California, *The Administration of the State's Domestic Violence Diversion Program Could Be Improved* (January 1990).

The committee received considerable testimony corroborating the Auditor General's findings of inadequacy in existing diversion programs. It was reported that probation officers fail to investigate the quality of the programs, and that some programs are wholly inadequate. In some programs, batterers were required to attend only a few hours on weekends. Some programs demonstrated a lack of knowledge about domestic violence by requiring the victims to participate in couples counseling²⁰⁹ or by blaming the victim.²¹⁰ Some programs appear to be simply "money-making schemes."²¹¹

It was suggested that programs need to be closely supervised with regular reports to probation and the court.²¹² However, less than half of the judges responding to the Judges' Survey reported that they required follow-up reports on diversion.²¹³ Judges should only divert batterers to programs that adhere to statewide standards and provide effective, follow-up monitoring. Moreover, if batterers are in different diversion programs for different offenses, such as drug-related offenses, these programs need to be coordinated.

2. DISTRICT ATTORNEYS/CITY ATTORNEYS

RECOMMENDATION 11

Request the Judicial Council to transmit the advisory committee's report and commend it to the attention of district attorneys and city attorneys who prosecute domestic violence offenses. The letter of transmittal should:

- (a) Outline the need for the treatment of domestic violence offenses as serious crimes and as felonies where warranted;**
- (b) Recommend establishment of a specially trained vertical prosecution unit to handle all domestic violence cases whenever possible;**
- (c) Recommend training for prosecutors regarding the availability of restraining orders pursuant to Penal Code section 136.2 in the criminal courts and encourage their use;**

²⁰⁹ Los Angeles public hearing transcript, p. 267.

²¹⁰ Written comment - El Dorado.

²¹¹ Los Angeles public hearing transcript, p. 274.

²¹² San Francisco regional meeting summary, pp. 63–64; Butte regional meeting transcript, pp. 87–88.

²¹³ Judges' Survey, question 19.

- (d) Recommend training for prosecutors regarding standards for effective diversion programs, including effective monitoring;**
- (e) Recommend training for prosecutors about interaction with domestic violence victims;**
- (f) Encourage district attorneys and city attorneys to continue to use victim/witness programs; and**
- (g) Recommend that the prosecutor file and pursue charges, where the evidence justifies such an action, regardless of whether the victim is willing to cooperate or to testify.**

DISCUSSION AND ANALYSIS

Domestic violence offenses are serious crimes and should be treated as such. Historically, however, "prosecutors and judges were reluctant to vigorously prosecute [domestic violence] cases for fear of breaking up family units or ruining a husband's career. All concern[ed] would subordinate a woman's safety to the issues of family and her husband's career," according to Los Angeles Deputy City Attorney Bowman.²¹⁴ As she further explained, the "cases that are considered by anyone's lights to be the less severe and the least likely of prosecution are domestic violence cases."²¹⁵ Most alleged batterers are prosecuted for misdemeanor offenses, although battery is prosecuted as a felony in San Francisco.²¹⁶ Where victims are reluctant to testify, prosecutors often drop the charges even if other evidence, such as eye witnesses, severe injuries, or other physical evidence, exists.²¹⁷ There was also testimony that prosecutors are quick to drop charges if the victim vacillates, and that "if the D.A.'s took the domestic violence cases as seriously as they take other cases, it would make a big difference in terms of women wanting to drop charges."²¹⁸

Vertical prosecution units, in which specially trained prosecutors handle a case from beginning to end, were reported to have proven successful in domestic violence cases.²¹⁹ Such units exist in Los Angeles, San Diego, San Bernardino, Santa Barbara,

²¹⁴ Los Angeles public hearing transcript, p. 264.

²¹⁵ *Id.*, p. 268; see also Los Angeles regional meeting transcript, pp. 61–62.

²¹⁶ Los Angeles public hearing transcript, p. 289; see also San Diego public hearing transcript, pp. 233–34.

²¹⁷ See, e.g., written comment, (March 11, 1988), on file at the AOC.

²¹⁸ San Francisco regional meeting transcript, p. 52.

²¹⁹ *Ibid.*

San Francisco, and San Jose.²²⁰ In Los Angeles, the prosecution unit was able to increase the caseload substantially,²²¹ and the emphasis on filing cases has resulted in "fewer repeat cases because [before] we were having the office program . . . treated as a revolving door."²²² One witness stated that a major benefit of vertical prosecution is:

The victim is talking to one prosecutor throughout the case. She doesn't have to go through the story to a variety of different prosecutors, and she also has someone who knows the special techniques that are often effective in dealing with these cases when you're prosecuting them.²²³

Many times, out of a realistic fear, victims may not want to pursue prosecution. Several witnesses suggested that one way for prosecutors to break the continuing cycle of violence is to have the prosecution, rather than the victim, sign the complaint. Under such circumstances, it is no longer the victim who chooses to press or drop charges.²²⁴ The decision rests with the prosecutor.²²⁵

San Diego and San Francisco County prosecutors follow this approach. Its benefit, it was suggested, is "to avoid the emotional dynamics that may come up as far as whether the victim wishes to go forward or doesn't, how fearful she is of retaliation, and so forth."²²⁶ According to one participant in the Northern California Coalition meeting, "No victim has ever dropped charges because it is not within her power to do that. I think that is an important distinction for the prosecutor's office to make; that it's the district attorney that drops charges or pursues charges."²²⁷ Further, as explained in a criminal law bench guide used in a judicial education program on domestic violence:

[T]he defendant's control over the victim is partially severed when the court makes it clear that the criminal justice system controls the case, not the defendant nor the victim. In this way, the defendant learns that coercing the victim into requesting that charges be dismissed is no longer an effective means of avoiding criminal sanctions.²²⁸

The committee concluded that procedures used in Los Angeles, San Diego, and San Francisco Counties may serve as successful models for prosecution of domestic

²²⁰ Los Angeles public hearing transcript, pp. 270–71.

²²¹ *Id.*, p. 269.

²²² *Id.*, p. 270.

²²³ San Francisco public hearing transcript, p. 293; see also San Francisco regional meeting transcript, pp. 52–53.

²²⁴ San Diego public hearing transcript, p. 193.

²²⁵ See, generally, Harvard Developments, *supra*, pp. 1540–41 (describing pros and cons of no-drop policies).

²²⁶ San Diego public hearing transcript, p. 192.

²²⁷ Northern California Coalition meeting summary, p. 1.

²²⁸ Family Violence Project, *Domestic Violence Benchguide for the Criminal Courts* (Draft 1989), at p. 45 (on file at the AOC).

violence cases. These procedures have, it seems, effectively dealt with problems presented by reluctant or recanting witnesses.²²⁹

3. VICTIM-WITNESS ASSISTANCE PROGRAMS

RECOMMENDATION 12

Request the Judicial Council to affirm the need for publicly funded, active victim-witness programs in each county to deal with domestic violence victims and commend and encourage the continued funding and support of these programs.

DISCUSSION AND ANALYSIS

Victim-witness programs contribute to the successful prosecution of domestic violence cases by providing needed emotional and practical support, such as transportation and child care, so that the victim can effectively participate in the prosecution.

Dee Fuller, director of the District Attorney's Victim Witness Assistance Program in San Diego County, explained: "If there's anything that's truly important to any crime victim, it's information, and it's resources; it's support, and it's knowing you're not alone."²³⁰ The San Diego program helps victims contact support agencies and provides basic services such as transportation, child care, and a lay advocate to accompany the victim to court.

Providing ongoing support to the victim was reported to be "a very important link in terms of getting convictions in domestic violence cases."²³¹ For example, Janet Carter, Director of the Criminal Justice Advocacy Unit in the San Francisco District Attorney's Family Violence Project, testified that victim advocacy services have resulted in a dramatic decrease in victim reluctance, an increase in filing rates, and a higher percentage

²²⁹ It was reported that some prosecutors and courts use service of a subpoena and the contempt power to compel victims to testify, to "keep a defendant from intimidating a victim into not coming to court on the day of trial, and thus resulting in the dismissal of the case" (San Diego public hearing transcript, p. 194). Witnesses who appeared before the committee strongly opposed this practice as a form of further "victimization of the victim"; cf. Harvard Developments, *supra*, p. 1541. Experience in several counties appears to show that it is possible to prosecute without the recanting victim (Los Angeles public hearing transcript, pp. 277–78).

²³⁰ San Diego public hearing transcript, p. 172.

²³¹ San Francisco public hearing transcript, pp. 266–67.

of convictions.²³² Therefore, public funding of victim-witness programs is recommended.²³³

4. LAW ENFORCEMENT

RECOMMENDATION 13

Request the Judicial Council to transmit the advisory committee's report and commend the report to the attention of law enforcement organizations and:

- (a) Highlight the need to give preference in service of process in domestic violence cases;**
- (b) Highlight the testimony in the report dealing with the need to treat domestic violence cases with the same seriousness as similar crimes against strangers;**
- (c) Highlight the testimony in the report dealing with the need to protect the victim after the alleged battery for long enough to permit the victim to arrange for his or her safety;**
- (d) Suggest the need for training of law enforcement officers on emergency protective orders, their availability, the means to notify victims, and how to obtain issuance;**
- (e) Suggest the need for training that restraining orders are to be enforced even where mutual orders have been issued by the court, and stress ways to accomplish the enforcement of mutual orders, that violation of restraining orders is cause for arrest, and that proof of service need not be filed with the court before enforcement is required; and**
- (f) Suggest that law enforcement training should be conducted by experts on all aspects of domestic violence including the characteristics of the victim and the batterer,**

²³² San Francisco public hearing transcript, p. 293; see also San Francisco regional meeting transcript, pp. 14–16, 53; Orange County regional meeting transcript, pp. 72–73.

²³³ San Francisco public hearing transcript, p. 266.

the seriousness of the crime, the need for arrest, measures to protect the victim, the need to make reports, and the need to give prompt attention to calls.

DISCUSSION AND ANALYSIS

The actions and attitudes of law enforcement officers can make a significant difference in the lives of a family torn by domestic violence.

Studies show that arresting a batterer when circumstances call for it is a greater deterrent to future violence than treating a battery as a mere family dispute.²³⁴ Also, releasing a batterer when bail release is available was described as "a really major problem for the battered woman because he may be back within an hour,"²³⁵ allowing the victim no time to get to safety. Police should augment, wherever possible, their efforts to provide for the victim's safety.

Witnesses testified that the police sometimes impose a requirement that a restraining order has been previously issued before they will appropriately intervene in a domestic violence dispute.²³⁶ The director of a rural victim-witness assistance program reported that the police stopped responding to a victim's calls because she had called too often.²³⁷ A victim was told by police that they would not help her because she had filed a complaint earlier and then dropped it.²³⁸ Police were also reported to have told victims that if they call again, both parties will be arrested.²³⁹ Police also failed to enforce an order from another county, believing it was not effective in their county.²⁴⁰

Law enforcement's failure to respond to calls for assistance can lead to tragedy, as in an incident which occurred in Los Angeles in 1989, where police lack of responsiveness resulted in four deaths. In that incident, a woman who had a restraining order against her husband called 911 for assistance after he threatened to come over with a gun. The dispatcher, after learning that this was "just" a threat, told the woman, "The only thing to do is just call us if he comes over there." He arrived 15 minutes later, and shot and killed the woman and three others.²⁴¹

²³⁴ Sherman and Berk, *The Minneapolis Domestic Violence Experiment: Police Foundation Report* (Washington, D.C.: Police Foundation, 1984).

²³⁵ San Francisco public hearing transcript, p. 268.

²³⁶ *Id.*, p. 283. See also Fresno public hearing transcript, pp. 203–25; Butte regional meeting transcript, p. 86; Orange County regional meeting transcript, p. 66.

²³⁷ Fresno public hearing transcript, p. 225.

²³⁸ Southern California Coalition meeting summary, pp. 9–10.

²³⁹ Southern California Coalition meeting summary, p. 11.

²⁴⁰ Written comment - Tulare.

²⁴¹ *911 Deputy Defended in 4 Killings* (Aug. 31, 1989) *The Sacramento Bee*, p. A3.

The committee heard testimony that even when police respond to a call, the response may be inadequate. For example, a full investigation with all available resources may not be forthcoming. Or police may take an informational report even when a violation of a restraining order occurs.²⁴² In other cases, police are slow to respond to TRO violation calls, apparently concluding that their time would be better spent on other matters.²⁴³ One victim testified she could not get the police to take her to a hospital, despite repeated requests. Instead, they told her to just go home, even though she was terrified.²⁴⁴ She also said that some officers showed great disrespect by laughing as they took pictures of her bruises.²⁴⁵

Victims may also be uninformed about the availability of emergency protective orders (EPOs), and law enforcement personnel lack training to inform victims adequately.²⁴⁶

The Legislature has attempted to rectify the inadequacy of police response to domestic violence through Penal Code section 13519, which requires law enforcement personnel to be offered training on the handling of domestic violence complaints. The section states that training "shall stress enforcement of criminal laws in domestic violence situations, availability of civil remedies and community resources, and protection of the victim." The committee received testimony that ongoing training has been effective in assisting law enforcement personnel to understand domestic violence issues and to provide better protection to domestic violence victims.

San Diego Police Lieutenant Leslie Lord explained: "Law enforcement officers . . . are struggling to overcome many of the misperceptions that are related to the psycho-social dynamics of the phenomena of domestic violence, or spouse battering."²⁴⁷ Much progress has obviously been made during the time this training has been offered, but problems continue to be reported. The proposals contained in the committee's Recommendation 13, above, should further enhance the sensitivity of law enforcement personnel to domestic violence.²⁴⁸

²⁴² Sacramento public hearing transcript, pp. 314–15.

²⁴³ Southern California Coalition meeting summary, p. 2; see also *Winning Orders Half the Battle in Family Violence* (Oct. 29, 1987) Daily Journal.

²⁴⁴ San Diego public hearing transcript, p. 252.

²⁴⁵ *Id.*, p. 254.

²⁴⁶ Southern California Coalition meeting summary, p. 4.

²⁴⁷ San Diego public hearing transcript, pp. 218–19.

²⁴⁸ *Id.*, pp. 229–30.

E. JUDICIAL EDUCATION**FINDINGS**

Judges play a major role in deterring domestic violence. The pathbreaking United States Attorney General's Task Force on Family Violence strongly advised judges to take seriously their impact on a defendant's future behavior. As the report explained:

Judges are the ultimate legal authority in the criminal justice system. If they fail to handle family violence cases with the appropriate judicial concern, the crime is trivialized and the victim receives no real protection or justice. Using the yardstick of the court to measure conduct, the attacker will perceive the crime as an insignificant offense. Consequently, he has no incentive to modify his behavior and continues to abuse with impunity. The investment in law enforcement services, shelter support, and other victim assistance is wasted if the judiciary is not firm and supportive²⁴⁹

Recognizing the vital role of the judiciary in curbing domestic violence, the committee offered three recommendations on judicial education, which are discussed below.

RECOMMENDATION 14

Request the Judicial Council to urge the Center for Judicial Education and Research (CJER) to conduct training of all judges on the following issues:

- (a) The psychological profiles of both victims and batterers;**
- (b) The nature and perpetuation of the cycle of violence and the battered women's syndrome;**
- (c) An understanding of the nature of the victim's experience and emotional state;**
- (d) An understanding of the intimidating effects the court system has on victims of domestic violence;**
- (e) An understanding of the role of professionals who work in the area of domestic violence including expert**

²⁴⁹ Attorney General's Task Force on Family Violence: Final Report (1984), p. 41.

witnesses and lay advocates;

(f) The need to issue enforceable and effective restraining orders and attention to whether the order should take effect immediately, should limit the taking of property, and should not be too limited in time;

(g) The need to inform victims of the availability of emergency protective orders by telephone;

(h) The need for focus on problems of the poor and minorities, including adequate representation, interpreters, and the avoidance of stereotypes about gender-based violence in ethnic or minority communities; the need for monitoring diversion to ensure that an effective program is completed; and

(i) Knowledge of safety measures to protect the victim including supervised visitation, neutral pickup points, third-party visitation arrangements, or creative visitation plans.

DISCUSSION AND ANALYSIS

According to evidence presented to the committee, sexual stereotypes and misconceptions concerning domestic violence do, unfortunately, still exist among the judiciary. Sometimes judges express active hostility toward victims of domestic violence. More often, the problem is simply lack of education. As Deputy City Attorney Bowman testified:

Most judges and bench officers are hostile to domestic violence prosecutions. They do not understand the nature of domestic violence, or the effects upon the victim. They have little patience with terrorized and hesitant victims and are unwilling to let prosecutors try cases in which no victim's testimony is available, or when the victim recants on the stand . . . What is needed is education of judges, prosecutors, and probation officers o[n] the issues of domestic violence.²⁵⁰

Incidents reported to the committee described below support Bowman's call for

²⁵⁰ Los Angeles public hearing transcript, p. 267; see also San Diego public hearing transcript, pp. 200–01: "[T]he biggest problem we have with judges is that they don't understand what really happens out there at two in the morning when this man . . . cuffs his wife upside the head."

ongoing, thorough judicial training on domestic violence issues. For example, testimony revealed that judges do not understand why a victim who has fled her home might come to court in jeans. Some think that victims invite the violence because they are seductive.²⁵¹ Sometimes they believe the victim should be passive, and don't understand her frustrations if she's loud and abrasive.²⁵²

Judges need training on why victims may want to drop charges.²⁵³ Since judges may not understand the cycle of violence, with tension building, explosion, and forgiveness, judges' perceptions that domestic violence allegations are either not as serious as stated or just not true are reinforced if complaints are later withdrawn.²⁵⁴ Some judges refuse to allow victims to testify about the events preceding and following the explosion,²⁵⁵ thereby depriving juries of desperately needed information about the cycle of violence experienced by victims. When one woman wanted to drop charges, the judge told her, "If you are unfortunate [enough] to have another beating and you make another complaint to the police, you will have a lack of credibility—by that I mean they won't believe you. Don't come before this court again, all right?" The judge then dismissed the case.²⁵⁶

In response to question 12a of the Judges' Survey, approximately 41 percent of the judges agreed, and approximately 6 percent strongly agreed, with the following statement: "In a proceeding involving allegations of domestic violence, supporting declarations and testimony are often exaggerated." Moreover, some judges were reported to minimize violence or display hostility toward domestic violence victims. One judge overturned a jury verdict when a husband assaulted his wife with a vacuum cleaner, because better weapons were available but not used.²⁵⁷ Another judge commented that a domestic violence victim "probably should have been hit."²⁵⁸ Many complaints were received about light sentences for batterers, orders for diversion despite the prosecutor's objection, and attempts to dispose of domestic violence cases quickly.

Several incidents of bias against people of color were also reported. One judge was reported to have said, "Well, don't you expect that in this type of culture," to an attorney representing a woman of color who applied for a restraining order after she had been beaten and had a gun held to her head.²⁵⁹ Another judge called domestic violence

²⁵¹ Los Angeles public hearing transcript, p. 262.

²⁵² San Diego public hearing transcript, pp. 215–16.

²⁵³ San Francisco public hearing transcript, p. 267.

²⁵⁴ Orange County regional meeting transcript, pp. 67–68.

²⁵⁵ San Diego public hearing transcript, p. 203.

²⁵⁶ Sacramento public hearing transcript, p. 186.

²⁵⁷ *Id.*, pp. 186–87.

²⁵⁸ Los Angeles regional meeting transcript, p. 59.

²⁵⁹ Orange County regional meeting transcript, p. 64.

"an old Chinese custom" when a Korean couple was involved.²⁶⁰ In another incident, "We have a judge who did say to a Cambodian client of mine, 'Why can't you name your children names like Robert and John to make it easier for us in court'"²⁶¹ Immigrant victims depending on their spouses for legal immigration status also reported that they are sometimes questioned about their green cards when pursuing a complaint of domestic violence.²⁶²

In view of the attitudes, misinformation, and lack of understanding indicated by comments such as these, the need for judicial education cannot be overstated. In sparsely populated rural areas, it is particularly important for judges to take a proactive role in educating themselves and the community about the harmful realities of domestic violence.

RECOMMENDATION 15

Request the Judicial Council to approve in principle and instruct staff and the appropriate committee to draft a Standard of Judicial Administration that would provide that, in cases where domestic violence has been established, custody or visitation orders should be issued in such a way as to ensure the safety of the victim of domestic violence, whether by supervised visitation, neutral pickup points, third-party visitation arrangements, or other creative visitation plans that protect all parties, including the children, from further violence or emotional harm.

RECOMMENDATION 16

Request the Judicial Council to approve in principle and instruct staff and the appropriate committee to draft a Standard of Judicial Administration encouraging each court to establish a committee composed of representatives from all sections of the domestic violence community. The role of these committees is to make recommendations to the court about policies and procedures for handling cases involving domestic violence.

²⁶⁰ Sacramento public hearing transcript, p. 185.

²⁶¹ Northern California Coalition transcript, p. 27; see also Drews, *1991–92 Hearings on Racial and Ethnic Bias*, p. 221.

²⁶² Report submitted by CWOCADV, *supra*, p. 3.

DISCUSSION AND ANALYSIS

Too often, custody and visitation orders fail to provide for the safety of children during their transfer between parents and their visit with the abusing parent.

As discussed earlier in this chapter, the committee received numerous reports that visitation and transfer of children were opportunities for further violence to occur. One victim explained, "You are given custody orders that expose you to harm at all times."²⁶³ A practitioner echoed:

[T]he safety of the woman, the mother, is often a concern when you have joint custody, or liberal visitation, because the contacts between the batterer and the victim are increased by liberal visitation with the batterer, and very often, the batterer will use the opportunities of visitation to have access to the woman and increase the violence.²⁶⁴

A case was reported in which a father under a restraining order nonetheless received visitation three days a week, allowing him to meet the mother twice a week to exchange the child; he murdered her during an exchange.²⁶⁵ Another victim reported that despite a restraining order, the batterer often showed up at her home, demanding the child. On one occasion, he raped her in front of the child.²⁶⁶ Even when transfer of the child took place at a police station parking lot, the same woman was assaulted by her ex spouse's new wife.²⁶⁷ Advocates reported that a batterer may follow a woman home from a transfer point.²⁶⁸ One witness testified that, with visitation orders, the judge

will not take into account that often a transfer of a child is an opportunity for the batterer to again harass the woman, to beat her up, to kidnap the child. Often we have women who were, who had moved out, and the batterer did not know where she lived. At the time of transfer [or] visitation the batterer would follow her home so that he could again have access to her²⁶⁹

The need to take safety into account was emphasized repeatedly, as was the need for programs like the YMCA Creative Visitation program in San Diego.²⁷⁰ That program

²⁶³ Los Angeles public hearing transcript, p. 122.

²⁶⁴ Sacramento public hearing transcript, p. 181; see also San Diego public hearing transcript, pp. 232–33.

²⁶⁵ Sacramento public hearing transcript, p. 181.

²⁶⁶ *Id.*, pp. 301–03.

²⁶⁷ *Id.*, p. 306.

²⁶⁸ Southern California Coalition meeting summary, p. 7.

²⁶⁹ *Id.*, pp. 6–7.

²⁷⁰ *Id.*, p. 7; Sacramento public hearing transcript, p. 181; San Francisco public hearing transcript, p. 281.

allows for on-site exchanges where the batterer and the victim do not meet and provides for supervised visitation.²⁷¹

As a former victim testified, based on her successful experience with supervised visitation monitored by a therapist, "[T]he courts can create a safety zone which protects endangered women and children from remaining trapped into perpetual harassment and fear."²⁷² She asked that courts "find the alternatives to traditional custody arrangements that allow/request continuous unmonitored visitation without regard to safety and psychological damage."²⁷³ Judicial education on domestic violence will go far toward increasing the safety of victims who invoke the protection of the judicial system.

V. CONCLUSION

Domestic violence is a complex societal problem of vast proportions. Ninety-five percent of domestic violence victims are women, often poor women and women of color. For these victims, the judicial system is the last hope for escape from the cycle of violence. Yet many battered women who try to invoke their legislative remedies encounter such significant obstacles, including complex rules, police hostility, cultural biases, and inadequate interpretive services, that they become victims yet again.

In investigating domestic violence, the council's Advisory Committee on Gender Bias in the Courts found no easy solution or quick cure for this epidemic. Nonetheless, the committee found a number of ways in which the judicial system could be streamlined and improved, in both its civil and criminal applications to domestic violence. The committee also concluded that a greater understanding of this troubling phenomenon, through educating judges and other participants in the system, would go far toward making the courts an ally, not an enemy, of the battered woman.

²⁷¹ San Diego public hearing transcript, pp. 175–77.

²⁷² Los Angeles public hearing transcript, p. 304.

²⁷³ *Ibid.*

Chapter Seven

Criminal and Juvenile Law

I. INTRODUCTION

California has the largest incarcerated female population *in the world*. The number of women in prison in this state is growing exponentially, rising from over 12,000 in 1977 to close to 27,000 in 1986. Since 1981, the state prison female population has grown at a faster rate than the male population has. By 1990, there were 6,057 women in the state prison system. The number of women in county jail facilities is also increasing significantly, with 3,000 women incarcerated in county jails in Los Angeles alone. That number is expected to triple by the mid-1990s.

The typical female prisoner in California is a woman between 18 and 40 years of age who has not completed high school. Between 70 and 80 percent of these women are mothers. The crimes they commit are mostly nonviolent (see Appendix O).

In reviewing the circumstances faced by women inmates, the committee found a considerable disparity between the resources available to men and women inmates. It is widely recognized that the system was established to correct men's behavior, and, as a result, it fails to address the specific needs of women.

Young female juvenile offenders fare no better than their adult counterparts. And they face many of the same problems: histories of physical and sexual abuse, emotional instability, substance abuse, and teenage pregnancy. Yet the problems of female juvenile offenders are frequently ignored. The young males in the system are in the overwhelming majority; and because of their more aggressive behavior, programs and policies are too often designed to meet only their needs.

The committee also found that the general lack of community-based programs has a disproportionately negative effect on women, who are still overwhelmingly the primary caretakers of children. For example, the placement of women outside their local geographical area seriously limits access to their children.

Women's caretaking role also creates a nexus between the criminal and juvenile justice systems. Since most incarcerated women and many female juvenile offenders are single parents, many of their children become part of the juvenile dependency system. The dependency system's failure to provide adequate reunification services translates into a lack of services for women and children.

In addition to considering how female offenders are treated by the courts and by the agencies that work with them, the committee also studied how courts appoint and compensate attorneys, both male and female, who represent indigents in criminal and juvenile proceedings.

The number of court appointments for indigent representation and the amount of money paid for these appointments can be substantial.¹ Court appointments affected by gender bias have serious consequences for the integrity of the judicial system, the representation of the client, and the economic and professional status of the lawyer. Qualified women and minority attorneys who are denied access to court appointments because of bias may be harmed through lost fees and damaged reputations. And if such attorneys fail to receive appointments, they will be less marketable as criminal experts and less likely to attract cases.

II. CHAPTER OVERVIEW

The committee's charge was to identify the ways in which the criminal and juvenile justice system treats females as compared to males. Is gender bias reflected in the manner in which courts make such decisions as appointment of counsel for indigent representation or appropriate treatment of adult and juvenile offenders?

During the course of its inquiry, the committee found that gender bias does in fact affect the ways in which the criminal and juvenile courts operate, both directly and indirectly. The committee's recommendations to ameliorate such bias include:

1. The establishment of formal written policies on and statistical reporting of fee-generating court appointments to ensure equal access for attorneys regardless of their gender, race, or ethnicity.

¹ Statistics provided by the Los Angeles Superior Court demonstrate that in Los Angeles County alone, approximately 47,000 criminal defendants were represented by counsel during the 1988–89 fiscal year. The majority of these defendants were represented by the public defender's office. A small percentage had private counsel, but approximately 11,000 of these defendants (about 23 percent) were represented by court-appointed counsel. For court-appointed attorney representation during the 1988–89 fiscal year, Los Angeles County paid more than 18 million dollars for criminal defense, 4 million dollars for juvenile delinquency cases, and 9 million dollars for juvenile dependency matters.

2. The suggestion that local and state agencies responsible for implementing criminal and juvenile court decisions.
 - (a) Develop protocols that make equally available to males and females programs, services, education, and training programs;
 - (b) Design programs and services that address the needs of female offenders who have infants and young children;
 - (c) Design programs and services that meet the special physical and medical needs of institutionalized females, including pregnancy-related health care; and
 - (d) Assure the safety of inmates and detainees from sexual harassment and assault by others.
3. The development and dissemination of informational materials on dependency law and procedure for use by institutionalized parents.
4. The development of legislation to implement protocols for state and local agencies responsible for inmates and detainees to notify and secure the presence of parents at dependency-related proceedings.
5. The implementation of measures to enhance the status of juvenile court.
6. The development of judicial training and standards on issues that relate to trial and jury selection in matters involving sexual assault, domestic violence, and child abuse.

III. METHODOLOGY

The committee used a number of research methods to gather data on gender bias in criminal and juvenile law. The primary tools relied upon by the committee included:

1. The testimony of the expert witnesses invited to participate in the public hearings;
2. Visits to two county jail facilities and interviews with staff and female inmates;
3. The responses to the Judges' Survey;

4. The testimony of attorneys with criminal and juvenile law expertise who participated in the regional bar meetings;
5. A survey of practices concerning fee-generating court appointments conducted by affiliates of California Women Lawyers; and
6. A comprehensive review of the literature.

Visiting the county-operated jail facilities was especially valuable because the committee obtained firsthand information about the concerns of incarcerated women. While the accuracy of the anecdotes related by the inmates could not always be verified, their perceptions, in conjunction with remarks by the staff, were highly instructive. And, in many instances, the inmates' complaints about conditions of overcrowding, lack of available resources, and lack of access to dependency court proceedings were corroborated by interviews with staff.

The committee requested organizations affiliated with the California Women Lawyers to gather specific information on the procedures for selection of appointed counsel on a county-by-county basis. It is important to recognize that although the information reported in the affiliate survey was anecdotal, other information provided to the committee, in regional hearing testimony and in confidential interviews of judges and court administrators by staff, supports the information collected.

IV. FINDINGS, RECOMMENDATIONS, DISCUSSION, AND ANALYSIS

A. APPOINTED COUNSEL

FINDINGS

The courts in California are responsible for appointing and compensating with public funds a significant number of attorneys to represent indigents in juvenile and criminal proceedings. Although the manner of appointment by each local court varies, female and minority attorneys appear to be underrepresented throughout the state. In this regard, the advisory committee found:

1. Generally, there is a lack of formal written court policies for court-appointed attorneys statewide.
2. The lack of written policies, recruitment protocols, and reporting requirements creates a climate in which gender and ethnic bias are likely to grow and remain unabated.

3. On a comparative basis, women and minority attorneys receive fewer appointments to the more financially lucrative death penalty and serious felony cases, while they receive more appointments to the less remunerative juvenile and misdemeanor cases.
4. In the absence of a requirement to keep and report statistical data showing the gender and race of attorneys appointed by the court, the type of case, and the amount of compensation, it is difficult to determine accurately whether court appointments are made in a bias-free manner.
5. Court appointments affected by the gender or race of an attorney create serious consequences for the integrity of the system, the representation of the client, and the economic and professional status of the lawyer.

RECOMMENDATION 1

Request the Judicial Council to approve in principle and instruct staff and the appropriate committee to draft:

(1) A Standard of Judicial Administration for trial courts, and an amendment to section 24 of the Standards of Judicial Administration for juvenile courts, which would provide a model local rule setting forth a policy with respect to the appointment of counsel to ensure equal access for all attorneys, regardless of gender, race, or ethnicity; and

(2) A rule of court requiring that each local court establish by local rule a policy for the appointment of counsel. The proposed rule shall provide that in the event a court fails to adopt a local rule regarding appointed counsel, the model rule contained in the standards shall be deemed the local rule.

The standards for the appointment of counsel shall include:

(1) A recruitment protocol to ensure dissemination to all local bar associations, including women and minority bar associations;

(2) A written description of the selection process that includes a statement of: minimum qualifications; application procedure; and selection procedure; and

(3) Regularly scheduled recruitment.

The proposed rule shall further provide for a mechanism for collecting and reporting statistical information on the gender, race, and ethnicity of attorneys appointed, in order to monitor implementation of the local rule. The mechanism should be developed on a countywide basis and cover at least a three-year period. The findings of the three-year study should be included in the Judicial Council's Annual Report to the Governor and the Legislature.

DISCUSSION AND ANALYSIS

In order to evaluate whether gender bias exists in the appointment process, the advisory committee sought to determine how criminal and juvenile courts recruit and select attorneys, and according to what formal policy, if any. The committee reviewed the testimony from the regional hearings, the California Women Lawyers Conference of Affiliates' survey of the courts, and staff interviews of judges and court personnel. Those commenting were asked to compare the various procedures and policies for the selection of appointed counsel in death penalty, serious felony, misdemeanor, juvenile delinquency, and juvenile dependency cases.

1. STATUTORY BACKGROUND

- **Attorney Appointments in Criminal and Juvenile Delinquency Cases**

The right to the appointment of counsel for an indigent accused of a criminal offense is guaranteed by both the federal and state Constitutions.² In California, it is the statutory duty of the public defender, upon order of the court, to represent any defendant accused of a crime who has not waived counsel and who is financially unable to afford counsel.

In counties where there is no public defender, or in cases in which the court finds—because of a conflict of interest or other reasons—that the public defender has properly refused to represent a defendant, the court will appoint a private attorney.³

² U.S. Const. 6 Amend.; Cal. Const., art. I, § 15.

³ Pen. Code, §§ 987 and 987.2.

If a county uses an appointed private counsel system as either the primary method of public defense or as a method of appointing counsel in cases where the public defender is unavailable, the county, the courts, or the local county bar association working with the courts are statutorily encouraged to do all of the following: (1) establish panels of attorneys open to members of the State Bar of California; (2) categorize attorneys for panel placement on the basis of experience; (3) refer cases to panel members on a rotational basis within the level of experience of each panel, except that a judge may exclude an individual attorney from appointment to an individual case for good cause; and (4) seek to educate panel members through an approved training program.⁴

Under certain circumstances, courts may also contract with an attorney or with a panel of attorneys to provide criminal defense services for indigent defendants. Unless there is a finding of good cause, the court is required by statute to use the services of the county-contracted attorneys prior to assigning any other private counsel.⁵

- **Attorney Appointments in Juvenile Dependency and Termination of Parental Rights Proceedings**

In California, generally there is no right to court-appointed counsel in civil cases. However, in juvenile dependency cases petitioned under section 300 of the Welfare and Institutions Code, the appointment of counsel for indigent parents or children is governed by state statute.⁶ There are other civil cases, such as proceedings to terminate parental rights, where the right to court-appointed counsel has been statutorily required as well.⁷

- **Compensation**

Compensation for a court-appointed attorney is paid by the county and/or state subject to any reimbursement from the party.⁸

⁴ Pen. Code, § 987.2.

⁵ *Id.*

⁶ Welf. & Inst. Code, § 317.

⁷ See, e.g., Fam. Code, §§ 7862–63; Welf. & Inst. Code, § 366.26(e).

⁸ See Pen. Code, §§ 987.2–987.6; Welf. & Inst. Code, §§ 317, 634.

2. PRESENT COURT PRACTICES AND PROCEDURES

The committee discovered, generally, an absence of formal written policies on appointment procedures for all kinds of cases. Of the 19 counties responding to the affiliate survey, four courts had written court policies for death penalty or felony cases, three courts had such policies for misdemeanor cases, and two courts had such policies for juvenile delinquency and dependency cases.⁹ Most of the counties with written policies were counties that contract with local firms to provide indigent representation.

The committee found that the manner in which courts make appointments varies according to local custom and culture. Most individuals responding to the affiliate and staff surveys indicated that their court had an official unwritten policy that encompassed some or all of the provisions suggested in section 987.2 of the Penal Code. However, in one instance, the survey respondent indicated that the court policy was to appoint attorneys at the pleasure of the judge. Another commentator said that the court did not have an official policy and that the local practice was to "try to select attorneys who need the business."

The unwritten policies generally included the development of a list by the court or the local bar association of eligible attorneys from which an individual judge makes an appointment. Frequently, attorneys on the list are designated to "pick up" new cases in the arraignment court on specified dates. The names of the attorneys on the list are supposed to be rotated so that a fair distribution can be made.

3. POTENTIAL FOR UNEQUAL TREATMENT

The committee found a greater percentage of appointments of female attorneys in courts having written policies. In two of the three misdemeanor courts that make appointments pursuant to written policy, women attorneys represented 25 percent and 33 percent, respectively, of the appointments. The third misdemeanor court with a written policy contracts with an outside firm for services, and no percentages concerning the gender of the attorneys in the firm were provided.

In the misdemeanor court with 25 percent female court-appointed attorneys, the bar association qualifies members for appointment. To qualify, attorneys must have a certain number of years in practice. A lottery every six months determines the panel. The court retains the right to approve the standards employed by the bar association, but is separated from the appointment process to avoid favoritism.

⁹ See results of California Women Lawyers Conference of Affiliates' Survey, (on file at the AOC).

In the misdemeanor court with 33 percent female court-appointed attorneys, attorneys are classified by experience at one of four levels. Misdemeanor cases are classified as "level one." It is at this level that the list of attorneys contains 33 percent females. According to the affiliate survey respondent, this percentage is the same as the percentage of women attorneys practicing in that county.

Although most individuals responding to the affiliate survey stated that their court followed its official policy, the committee received evidence suggesting that the actual practice may differ from the policy. One survey respondent indicated that appointments frequently were made to attorneys who happened to be present in court, even if they were not on the list. Another respondent stated that although there was a list of volunteers maintained by the clerk, an unspoken "good ole boy" policy was often followed.

Testimony at the regional meetings also indicated that judges do not always follow the unwritten policy and instead appoint attorneys according to their own pleasure and, possibly bias. One judge commented anonymously that in the busy metropolitan courts the selection is often made by the clerk, and that even if there is a list, the clerk may sometimes skip over certain names in favor of others.

A prosecuting attorney who testified before the committee observed the following:

In the area that I am in there are 987 appointments and you belong to the panel for the local bar association that surrounds the courthouse. And the good-ole-boy network system is alive and well and flourishing.¹⁰

This attorney indicated that sometimes sexism and racism played a role in making appointments. She related an account of two white male prosecutors who left the district attorney's office for private practice in early January 1988. By mid-January they were in superior court picking up cases. They were able, she said, to "short-circuit the procedure" and pick up appointments over those attorneys who were next in line.

She also stated that in the geographical area in which she works, about 75 percent of the attorneys on the appointment list are African-American. Nonetheless, if they are not in court, they are not appointed. The courts, she noted, are supposed to call the attorney on the list before they give away the appointment. They do not call, however, even though they know the names of the persons who are designated to pick up the felony custody arraignments and misdemeanors.¹¹

¹⁰ Los Angeles regional meeting summary, pp. 7-8.

¹¹ *Ibid.*

4. NEED FOR UNDERSTANDING OF QUALIFICATIONS AND CRITERIA FOR APPOINTMENTS

In the criminal appointment process, how courts define a "qualified attorney" is rarely specified. Experience and a willingness to serve are frequently stated as criteria for establishing eligibility. But how does an attorney obtain the requisite experience if a judge makes appointments with no formal policies? Without formal policies, courts are entirely free to apply differing standards to determine eligibility. One survey respondent noted that while female lawyers received some of the appointments, male lawyers seemed "to receive the majority of the appointments regardless of the extent to which they practice criminal law."¹²

In the current atmosphere of unwritten and undefined policies, recruitment and eligibility requirements appear elusive. In this type of environment, gender bias may easily infect court appointments. If there is no written policy, or if a judge ignores the policy and continues to appoint attorneys at the judge's pleasure, meeting the qualifications and being placed on the list becomes meaningless.

5. UNDERREPRESENTATION OF FEMALE ATTORNEYS IN SERIOUS FELONY CASES AND OVERREPRESENTATION IN JUVENILE PROCEEDINGS

The committee found evidence that there still exists a significant underrepresentation of female attorneys in appointments made for felony and death penalty cases. If women attorneys do receive court appointments, they are appointed on lesser crimes or misdemeanors and juvenile cases. The committee found the profile of the typical appointment for a female attorney to be consistent with stereotypical ideas of the role that should be played by a woman in the law—she should work on cases involving children and families. This attitude results in lower compensation for women attorneys, because the schedule of fees for juvenile and misdemeanor cases is frequently lower than for felony and death penalty cases. (See Appendix O for sample schedule of fees.)

Staff interviews with judges and court administrators in Los Angeles and other counties indicated a general perception that women make up a larger percentage of the panels for juvenile dependency and misdemeanor cases than for felony and death penalty cases.

The committee also heard testimony at the regional hearings about the disparity in appointments. One attorney observed:

¹² Conference of Affiliates Survey Data; on file at the AOC.

I saw it, more times than not, happening with the more serious cases being given to the men and this would be the system, not just whereby you had a day to pick up and if you came to pick up, you got all those cases, of course.

This would be a case where several attorneys were in the room, in a courtroom and, of course, they'd look over you and look all around and say, we'll give it to the guy back here.¹³

A deputy district attorney in Los Angeles stated that she had not observed any women attorneys being appointed to death-penalty cases. She noted, "There are many women attorneys who have been practicing a long time and it just seems that they do not get the more serious cases."¹⁴ She further indicated that to qualify to be on the panel, you had to be an attorney for a certain number of years or have handled a certain number of cases. She cautioned that if women are not being appointed to a sufficient number of cases to begin with, they probably cannot qualify for the death penalty cases.¹⁵

Another attorney testified:

I know of a case where a black female attorney, who has a very good track record, was not appointed to a capital case because she's a black female.

There was no real justification why she didn't get that case, and this happened in the same context as the other ones have. She was supposed to be the next in line to pick up a case and somebody made a phone call from the judge's chambers and gave it to one of his friends and she missed out on the appointment. And she's a very well qualified person, very highly respected, and fought and kicked and screamed and called it to everybody's attention.

I think they tried to make some kind of atonement by giving her the next couple of cases. But, it was a high-publicity case and it was a special circumstance case, and she missed out on that, in my opinion. And, the way it was handled, because she's a female, one, and because she's a black female, number two.¹⁶

¹³ Los Angeles regional meeting transcript, p. 131.

¹⁴ *Id.*, pp. 143–44.

¹⁵ *Ibid.*

¹⁶ *Id.*, pp. 132–34.

6. NEED FOR RECRUITMENT

Given the dearth of female attorneys on many of the lists and in the contract firms, the manner in which attorneys are recruited to serve raises issues of serious concern for the committee. The committee noted that the percentage of women attorneys appearing on behalf of the contract firms appeared to be the same, if not lower, than on court-selected panels. Several respondents to the survey indicated that there were few, if any, female attorneys practicing criminal law in that county. One commentator noted that there was only one female attorney in his county that handled criminal cases. Another stated that the criminal bar in the county is 100 percent white male. Still another survey respondent stated that the list for criminal and juvenile court appointments is not diversified because there are so few women or minority attorneys in that county who have made themselves available.

The committee questioned on what basis survey respondents concluded that no women or minorities were available to serve. Without formal recruitment policies, interested individuals may be uninformed of the availability of these appointments and may feel unwelcome. To ensure a diverse panel of court-appointed attorneys, a recruitment protocol directing application information to all local bar associations, including women and minority bar associations, and regularly scheduled recruitment, are desperately needed. The committee also urged that recruitment protocols be included in contracting with firms.

7. NEED FOR STATISTICS

Although very few counties participating in the affiliate survey gave statistical data specifying by gender the number of male and female court-appointed attorneys for the various kinds of cases, several did, and the information was revealing.

For juvenile dependency cases, two counties reported a significant number of women attorneys on the panel. One county reported that four out of the nine attorneys were female.

For juvenile delinquency cases, the results differed slightly. The percentage of female court-appointed attorneys was less than for dependency cases. For example, a small county with three female attorneys on its dependency panel reported it was unable to locate available women for its delinquency panel. The county with four females out of nine attorneys on its dependency panel also reported a smaller percentage of female attorneys on the delinquency panel. In that county, only seven out of twenty-six attorneys were women, and only two women attorneys handled the more serious cases. The stereotypical perception appears to be that women can represent abused and neglected children better than delinquent children.

When the focus shifted to adult criminal court, the percentages changed even more dramatically. As reported earlier in this chapter, two courts indicated a fairly substantial percentage of women attorneys on their misdemeanor panel, ranging from 25 to 33 percent female. For felony and death penalty cases, though, most courts indicated only one or no women attorneys on their list. Inexperience and unavailability were the usual reasons given for this startling lack of women.

Significantly, few counties surveyed actually keep statistics on the number of women or minority attorneys receiving court appointments. It would not be difficult for a county to gather this information: all attorneys are required to complete fee declarations to receive compensation by the courts. An explanation about the collection of the statistics should be provided to appointees, who should be permitted to report information concerning their race and ethnicity on a voluntary basis.

8. CONCLUSION

Written policies describing recruitment protocols and selection procedures, and regularly scheduled enrollment periods, would provide both courts and attorneys with a common understanding of the selection criteria and the appointment process. In addition, the reporting of statistical information regarding the gender, race, and ethnicity of court-appointed attorneys would heighten courts' awareness of potential bias. By adopting standards for the appointment of counsel, along with a model rule and a rule requiring reporting of statistical data, the Judicial Council can encourage equal access to and equal treatment in publicly financed court appointments.

B. PROGRAMS, SERVICES, AND FACILITIES FOR INMATES

The committee also examined the ways in which males and female inmates are differentially treated by the criminal justice system, especially with respect to disposition and sentencing alternatives, placement in institutions, and education and training programs. Although conditions are improving, the committee found, the disparity between available resources for male and female offenders is still profound.

FINDINGS

1. The number of female offenders in California, although increasing, is a small percentage of the adult and juvenile probation and inmate population.
2. There are far fewer available resources, programs, services, and facilities available for female offenders. They are given a lower priority in the

justice system, compared to their male counterparts, who enjoy a disproportionate share of the resources and facilities.

3. There are few, if any, programs designed to meet the special needs of institutionalized females.
4. The majority of adult women inmates are single mothers, whose children are frequently dependents of the court. Thus, the lack of coordination of services and programs between the criminal and juvenile dependency systems has a negative impact on women. In addition, the lack of community-based resources has a more significant impact on women because they are still overwhelmingly the primary caretakers of children. Insofar as the justice system does not provide adequate reunification services, the lack of resources for families translates into a lack of services for women and children.
5. The problems faced by female juvenile offenders are similar. Many have young children who are also the subject of juvenile court jurisdiction. There is a critical shortage of programs to meet their special medical and mental health needs.
6. Community-based alternative sentencing programs that keep nonviolent sentenced women and their children together or facilitate regular contact should be encouraged.

1. LOCAL PROGRAMS AND SERVICES ADMINISTERED OR SUPERVISED BY PROBATION DEPARTMENTS OR COUNTY WELFARE AGENCIES¹⁷

RECOMMENDATION 2

(a) Request the Judicial Council to recommend to local probation departments that (1) sentencing and dispositional alternatives and rehabilitation programs for adults and juveniles administered or supervised by probation departments be augmented so that they are made available on an equivalent basis to males and females, without diminishing the services presently available; (2) sentencing and dispositional alternatives and rehabilitation programs for adults and juveniles administered or supervised by probation departments be

¹⁷ The duties of a probation officer may be delegated to the county welfare department when supervising cases involving dependent children of the juvenile court. See Welf. & Inst. Code, §§ 215, 272(a).

made available to meet the special needs of pregnant women and women with young children; and (3) residential programs administered or supervised by the probation departments be maintained in facilities with space suitable for family visitation; and

(b) Request the Judicial Council to approve in principle and instruct staff and the appropriate committee to draft a standard of judicial Administration for trial courts, and to amend section 24 of the Standards of Judicial Administration for juvenile courts, to encourage each judge presiding over criminal and juvenile cases to become familiar with and consider sentencing and dispositional alternatives and programs available through the probation department.

The committee's investigation of the treatment of female offenders revealed that those under the supervision of the probation department encounter many obstacles not faced by males. Typically, the female offender is a single parent with a drug abuse problem. Consequently, she faces a range of personal and family challenges greater and more complex than those faced by most male offenders.

Yet, there was a consensus among experts regarding the lack of programs and services available to females, not only in the adult system but in the juvenile system as well. Some commentators attributed the lack of local services and facilities to the comparatively small number of females in both the adult and juvenile justice system. However, the committee noted that administrative convenience and the relatively smaller number of females in the justice system are not valid reasons to deny services to women.¹⁸

- **Juvenile Dependency Cases**

In order to evaluate fully whether gender bias exists in the availability of community-based services, it is important to understand the applicable juvenile dependency laws in California as they relate to institutionalized females.¹⁹

A child is subject to the jurisdiction of the juvenile court if the minor's parent has been incarcerated or institutionalized and cannot arrange for the care of the minor.²⁰

¹⁸ See generally, *Molar v. Gates* (1979) 98 Cal.App.3d 1 [159 Cal.Rptr. 239].

¹⁹ Please note that the statutory references in this chapter are to the laws in effect at the time the draft report was submitted to the Judicial Council.

Unless a court orders otherwise, whenever a minor is removed from a parent's or guardian's custody, the juvenile court shall order the probation officer to provide child welfare services to the minor and the minor's parents or guardians for the purpose of facilitating reunification of the family *for a maximum time period not to exceed 12 months*. Services may be extended for up to an additional six months, if it can be shown that the objectives of the reunification plan can be achieved within the extended time period.²¹

Welfare and Institutions Code section 361.5(e)(1) also provides specific guidelines for reunification services for institutionalized parents:

If the parent or guardian is incarcerated or institutionalized, the court shall order reasonable services unless the court determines, by clear and convincing evidence, those services would be detrimental to the minor. In determining detriment, the court shall consider the age of child, the degree of parent-child bonding, the length of the sentence, the nature of the treatment, the nature of crime or illness, the degree of detriment to the child if services are not offered and, for minors 10 years of age or older, the minor's attitude toward the implementation of family reunification services, and any other appropriate factors. *Reunification Services are subject to the 18-month limitation imposed in subdivision (a).* Services may include, but shall not be limited to, all of the following:

- (A) Maintaining contact between parent and child through collect phone calls.
- (B) Transportation services, where appropriate.
- (C) Visitation services, where appropriate.
- (D) Reasonable services to extended family members or foster parents providing care for the child if the services are not detrimental to the child.

An incarcerated parent may be required to attend counseling, parenting classes, or vocational training programs as part of the service plan if these programs are available. (Emphasis added).

The statute specifically provides that institutionalization of the parent during the 18-month period does *not* serve to interrupt the duration of the period. Because this time period is so short, many incarcerated women face the loss of their children.

- **Lack of Alternative Programs for Female Offenders with Children**

²⁰ Welf. & Inst. Code, §§ 300(g).

²¹ Welf. & Inst. Code, § 361.5(a).

Barbara Bloom, a criminal justice consultant and member of the Blue-Ribbon Commission on Inmate Population Management, noted that *over 75 percent of incarcerated women are mothers or mothers-to-be*. The situation is very serious for the children of these inmates, who are typically taken from their mothers two days after birth. Those not born in prison face the loss of their mother through the expiration of the statutory reunification period. Either way, many of these children experience emotional problems, physical trauma, lack of self-esteem, and abuse. Bloom decried the remote location of most state prisons, which prevents frequent mother-child contact and urged the expansion of the sentencing alternatives for adult women offenders who are mothers.

Bloom explained:

[E]very effort should be made to preserve and strengthen family ties between incarcerated mothers and their children, and the policy-makers, the courts, and the law enforcement officials who run our prisons and jails should be involved in diverting as many eligible women as possible, and as . . . the majority of women in prison are non-violent, diverting them from penal institutions and placing them in alternative settings. On the local level, work release programs, community service, restitution, substance abuse treatment programs, employment readiness programs . . . need to be developed, and . . . expanded.²²

Linda Siegal, Executive Director of the California Foundation for the Protection of Children, echoed Bloom's suggestions for reform. At the time her testimony was received, Siegal had been involved in children's services for 25 years, 15 of those in California. Based on her years of experience, she encouraged the development of alternative mechanisms for female offenders of child-bearing age, including use of electronic monitoring in lieu of incarceration.²³

- **Particular Need for Drug Treatment Programs**

During the course of its inquiry, the committee identified exemplary programs worthy of note and possible replication. These programs may reduce recidivism and help accommodate the unique and disparate problems that females, especially those who are mothers, face in the criminal and juvenile justice systems.

The committee was especially impressed by testimony regarding three model programs, all operated in Watts in South Central Los Angeles, that offer a better approach to dealing with substance-abusing women and their drug-exposed newborns

²² San Francisco public hearing transcript, pp. 245–46; *id.*, pp. 242–46.

²³ Sacramento public hearing transcript, pp. 284–87.

and children than incarceration. These programs were funded primarily by foundation grants.

The committee learned of these programs from Kathleen West, program development director of the Eden Development Center and its two sister programs, the Children's Ark (Assistance and Relief for Kids), a crisis intervention nursery, and Project Support, an outreach program.²⁴ West told the committee that she had been working on the issue of drug-exposed newborns and drug use in pregnancy for five years at the Martin Luther King and University of California at Los Angeles hospitals. Her work included an eight-year follow-up study of 1,300 drug-exposed newborns in Los Angeles County as part of a doctoral dissertation.²⁵

Through her work, West concluded that there is a severe shortage of programs and facilities for substance-abusing women, a fact that she attributes "resounding[ly]" to gender bias.²⁶ West emphasized that the limited treatment programs available were designed for men and tend to be run by male ex-addicts. These programs have little success with substance-abusing women. She observed:

[A] lot of the mothers that we have identified because of their substance abuse are court-ordered to drug treatment programs, which do not take women with children, or do not take pregnant women, or do not take a woman with more than one child, or a child over a certain age, or whatever, and that seems to be quite legal, although it's very bizarre.²⁷

In contrast, West explained, the Children's ARK and Project Support programs were specifically designed to meet the unique needs of substance-abusing women. The umbrella program, Eden Project, is a cooperative therapeutic daycare center for drug-exposed babies and their siblings, which also teaches parenting skills to the mothers.

The Children's ARK program is a crisis intervention program that seeks to prevent neglect and abuse from occurring after women have obtained custody of their children. West observed that ARK is also a cooperative program, "not just a regular respite care program, where you drop the kid off and then go out and buy some crack." Instead, you may "drop the kid off if you need to, and then you are required to stay there and learn how to deal with whatever problems were there in order to prevent the next crisis."²⁸

²⁴ Los Angeles public hearing transcript, p. 317.

²⁵ Los Angeles public hearing transcript, p. 320.

²⁶ *Id.*, pp. 318–21.

²⁷ *Id.*, p. 318.

²⁸ *Id.*, p. 320.

Project Support is a program aimed at maintaining the mothers' motivation to care for their baby immediately postpartum, to tide them over until they are admitted to a treatment program. Project Support has outreach components, both home- and hospital-based, both prenatal and postpartum, in which the staff works with substance-abusing women to help them stay "clean." As West observed, Project Support is critically important, given the extremely long waiting lists for drug treatment programs in Los Angeles County.²⁹

In emphasizing the importance of these kinds of community-based programs, West explained that the women she works with experience a tremendous amount of guilt and denial surrounding the birth of a drug-exposed baby; indeed, the women believe it is morally wrong. Yet, about 50 to 60 cocaine-exposed newborns are delivered each month at Martin Luther King Hospital alone. According to West:

[T]hey externalize their own moral judgment about their reality, and when they are already unempowered, they have very low self-esteem, they've been victimized and abused for a long time, usually, they're resigned to living in a zip code where you can't protect your four-year-old from drug dealers, and these women often accept legal actions, albeit discriminatory on the basis of both race and gender as just actions, partly because they are done by the legal system which they empower with right. And they are very, very hard on themselves.³⁰

In pleading for therapeutic, rather than punitive, programs to help these women and children have a better life, she said:

[W]e are identifying lots of substance-abusing Hispanic and African-American women, but we are not doing anything therapeutic about it. The fact that we've now got about 36,000 children in out-of-home placement in L.A. County and with the largest increase in that population being under the age of one, which our society has never dealt with before, we have never had children under the age of one, who are very different people, being state charges, and we are not caring for them well. That it is eviden[t] that these women are coming back with multiple drug-exposed babies. . . . [L]ike family planning problems in developing countries, they replace the children that they lose, and we're not being therapeutic in how we're going about it right now.³¹

²⁹ *Id.*, pp. 318–20.

³⁰ *Id.*, p. 324.

³¹ *Id.*, pp. 326–27.

The committee also heard testimony on the need for special rehabilitation programs to address the problems of women who are drug abusers from Marie Bockwinkel, an attorney in Los Angeles. She testified that the increasing practice of incarcerating pregnant women who have drug problems is an expensive and illogical alternative to providing a drug treatment program like Eden Center. As she explained, incarceration can be dangerous to both mother and fetus because the health care that is found "in a prison setting is not adequate for the people who are there now, and certainly not adequate for a pregnant woman, or a fetus."³² She called for improved prenatal care for all women, noting that "it's estimated that there are approximately 32,000 pregnant women in the State of California who can't get prenatal care."³³

In addition to systemic gender bias against pregnant women who abuse drugs or alcohol, speakers at the hearings also expressed concern about biases based on ethnicity and poverty. Elaine Rosen, president of the Los Angeles Juvenile Courts Bar Association, raised concern about possible unequal treatment between poor women of color and wealthier women who give birth to drug-exposed infants. She explained that "[a] majority of the families that come into the court system are of lower socioeconomic class. They are primarily Black and Hispanic, and it really is very rare to see a white middle class family coming into the system."³⁴ Not surprisingly, the majority of cases involving drug-exposed infants that are referred to the juvenile court:

. . . come from hospitals in South Central . . . L.A. We rarely get referrals of drug babies from Cedar-Sinai, or from other private hospitals, and I know from people that I know that work in those hospitals, there are babies born under the influence in more prestigious, private hospitals. There is a disparate recording and of course, this affects women and their children.³⁵

Rosen's theme was echoed by West, who decried the plight of her program's clients, substance-abusing women in Watts:

Not surprisingly, bias based on race was the overwhelming prejudice that they experienced, and . . . they experienced this everywhere with their lives, including Juvenile Dependency Court, Criminal Court, jail and prison settings, prenatal care, family planning clinics, hospitals, police, probation, parole officers and most of them have been involved with all of them.

They also had an experience of sex discrimination. All of them could identify with it. They all sympathize with it, and they supported each

³² *Id.*, p. 322.

³³ *Id.*, p. 333.

³⁴ *Id.*, p. 309.

³⁵ *Id.*, p. 312.

other as they shared some incredibly unfair and sex biased experiences when we had several of these discussions.³⁶

- **Special Problems Faced by Juvenile Offenders**

A number of experts in the field informed the committee of the special problems facing female juvenile offenders. Justice Daniel M. Hanlon, then presiding judge of the San Francisco Superior Court, remarked that, as a supervising judge of the juvenile court for three years, he had been concerned about the lack of adequate funding and facilities for girls and young women who entered the juvenile justice system in his county. He wondered why resources were not being made available, and said that it was perhaps based on gender and the number of females coming into the system.³⁷

Anna Roberts, Deputy Public Defender of Los Angeles County, decried not only the lack of services, but also the dearth of research and statistics available on girls who come into the juvenile justice system as incorrigibles or delinquents under sections 600-602 of the Welfare and Institutions Code. Roberts worked with women and girls in the Los Angeles justice system in one capacity or another since 1960. Her experience included seventeen years as a deputy probation officer and six years as a deputy public defender, working mostly in juvenile services.³⁸

She observed that although an increasing number of girls are engaging in delinquent acts that threaten public safety, most still seem to behave in a self-destructive manner. She contended that because girls do not act out publicly, community agencies, schools, and law enforcement agencies tend to ignore, excuse, or neglect girls with problems. Many treatment programs available to minors use behavior modification techniques and work with groups rather than individuals, approaches that are not always appropriate for girls. The general lack of mental health resources has a greater impact on girls, she noted.³⁹

Linda Siegal, Executive Director, California Foundation for the Protection of Children in Sacramento, joined many other witnesses in expressing concern about the lack of local camp and ranch alternatives for juvenile girls. She also called for training probation officers and counselors to be sensitive to the problems that girls have. Although Siegal expressed concern about placing girls and boys in the same facility, she suggested building adjunct programs for the girls next to the boys' facility.⁴⁰

³⁶ *Id.*, p. 322.

³⁷ San Francisco public hearing transcript, p. 12.

³⁸ Los Angeles public hearing transcript, pp. 252-53.

³⁹ *Id.*, pp. 253-54.

⁴⁰ Sacramento public hearing transcript, pp. 287-89.

Susan K. Medina, a former attorney in the Public Defender's Office in Fresno, described the lack of local programs for adolescent mothers. She observed that in Fresno County there were no local group homes for teen mothers, and that often they were forced either to give up their child or to place the child in foster care. The only other alternative, she indicated, was to send mother and child to Los Angeles or San Francisco where some programs allowed the child to remain with the mother.⁴¹

- **Need for Increased Awareness by Judges of Sentencing Alternatives**

Many of those testifying before the committee stressed the need for judges to become more aware of available alternative sentencing programs, where appropriate.

For example, Ann O'Reilly, Director of Family and Children's Services for the City and County of San Francisco, urged courts to consider making sentencing orders that would assist the female offender in maintaining her parental role:

The maintenance or establishment of the role as a mother has been shown to be a critical factor in motivating women, and in keeping them from re-offending after release. This is particularly true of women who have just given birth. There is a window of opportunity there, a time to motivate women that really doesn't come around very often, and when you take babies away from women at two days, you lose it, and you may have lost it permanently. I would argue that such programs make sense economically due to lower recidivism, reduced prison population, but probably, more importantly, from a social policy perspective in that the family unit which we keep being told is so very vulnerable in our society today, I believe can be protected and strengthened through such programs.⁴²

O'Reilly also joined others in the call for seeking alternatives to incarceration on a statewide basis. The committee concluded that increased alternatives to incarceration, especially in the form of special programs that allow women and children to remain together, as well as increased judicial awareness of such programs, would go far to ameliorate gender bias in the criminal justice system.

⁴¹ Fresno public hearing transcript, pp. 258–59.

⁴² San Francisco public hearing transcript, p. 343.

2. INSTITUTIONS AND PLACEMENTS

RECOMMENDATION 3

(a) Request the Judicial Council to recommend to the Department of Corrections, California Youth Authority, and local agencies that adult and juvenile facilities (institutions and placements), for detention, disposition, or sentencing, be augmented so that they are made available on an equivalent basis for males and females, without a diminution of facilities presently available; and

(b) Request the Judicial Council to approve in principle and instruct staff and the appropriate committee to draft a standard of judicial administration for trial courts, and to amend section 24 of the Standards of Judicial Administration for juvenile courts, to encourage each judge presiding over criminal and juvenile court proceedings to become personally familiar with all detention facilities, placements, and institutions used by the court for males and females.

DISCUSSION AND ANALYSIS

Information concerning the availability of local facilities for placing female offenders was obtained through the public hearings, jail visits, and the Judges' Survey. Again, the committee identified a need for both adult and juvenile facilities that keep the female offender within her community, close to her family. As discussed in the previous section, local placements for mothers who have a dependent child should be given the highest priority so as to facilitate reunification.

- **Legal Framework**

The constitutional issues concerning equivalent programs and placements for incarcerated female inmates were discussed in depth in the seminal case of *Molar v. Gates* (1979) 98 Cal.App.3d 1.

In *Molar*, the Court of Appeal affirmed the trial court's conclusion that the county's practice of providing minimum security jail facilities with their attendant privileges to male prisoners, while denying such facilities and privileges to female

inmates, constituted invidious sex discrimination in violation of the equal protection clauses of the state and federal Constitutions.

Molar's plaintiff, a female inmate serving a one-year sentence in the Orange County jail, filed a petition for writ of mandate on behalf of herself, and all other women who were sentenced or would be sentenced in the future to the county jail, to require the defendants (the Sheriff and Board of Supervisors of Orange County) to (1) permit female inmates to be housed and detained at minimum security branch jails that were used exclusively for male inmates; (2) apply the same criteria to female applicants as were applied to male applicants in determining their eligibility for such housing; (3) house female inmates who are eligible for minimum security detention at the minimum security branch jails; and (4) permit female inmates housed at branch facilities to apply for, and be assigned to, available jobs on the same basis and under the same circumstances as male inmates.⁴³

At the time the petition for writ of mandate was filed, all incarcerated females were housed in a women's jail facility. The court described the conditions at the women's jail:

The building, first occupied in 1968, is a concrete and steel structure with opaque windows so that inmates cannot see out. The inmates sleep in dorms designed to hold 15 prisoners. When not sleeping or working, they may use adjacent day rooms furnished with television, radios, books, magazines, box games and puzzles. They are permitted to see a movie once a week. Outdoor recreation is available 4 hours per week on the roof of the jail in an area approximately 33 feet square. Inmates are permitted to make telephone calls during the recreation periods. Inmates may have visitors five days per week in half hour increments but *they are separated from their visitors by a glass partition so that they cannot hold infants or otherwise touch their guests.*⁴⁴ (Emphasis added.)

Unless unable to do so, all sentenced women were required to work in the jail facility. The jobs for the women inmates consisted of washing and ironing, cooking, stocking food shelves, serving food, cleaning, mopping and waxing floors, collecting trash, sewing and mending clothes for male inmates, and serving as beauty operators.⁴⁵

Approximately 10 times as many men as women were sentenced to jail in Orange County. The men served their sentences in one of three facilities maintained by the county—the main men's jail and two branch jails (Theo Lacy and James A. Musick).

⁴³ *Molar v. Gales* (1979) 98 Cal.App.3d 1, p. 6.

⁴⁴ *Id.*, p. 7.

⁴⁵ *Ibid.*

About 55 percent of the sentenced male inmates served their time at the main facility where conditions were found to be "more onerous" than those of the women's jail.⁴⁶ The remaining 45 percent of the male inmates served their time at one of the two branch jails.

The Lacy branch facility was a minimum security jail consisting of an eight-acre campus surrounded by a chain link fence. Inmates were housed in unlocked barracks and were permitted to move freely around the compound and use the athletic field. The campus also included a library, mess hall, shops, a handball court, basketball hoop, and horseshoe pitches. The male inmates were allowed visitors on both Saturday and Sunday and could shake hands or kiss their guests and hold children. All of the inmates were either on work furlough or assigned to jobs within the jail system. The men assigned to jail system jobs (approximately 31 percent) cooked, cleaned, maintained the campus yard, cleaned and polished floors, and did minor repairs. The men with work assignments off campus (about 59 percent) worked at the county animal shelter, county service station, environmental management agency, sheriff's office, road department, county transportation, and forestry division.⁴⁷

The Musick branch facility was a 100-acre farm located in a rural area of the county. All of the men assigned to Musick, except a small crew, worked on the compound raising crops, poultry, and livestock. They also did the cooking and maintenance work for the facility. They lived in barracks with high windows and were allowed to move around the acre-and-one-half inner compound after dark. They also had use of an athletic field and handball court. Male inmates at this facility were also permitted visitors on both Saturday and Sunday and could shake hands with or kiss their guests and hold infants. Once a month, each inmate was allowed a two-hour picnic with visitors to the compound.⁴⁸

The trial court found that inmates assigned to the branch jails were confined under substantially less onerous and restrictive conditions than those in the main jails. The court also found that the defendants had pursued a policy and practice of providing minimum security branch facilities and related outdoor work programs only for male inmates, and that "female inmates [were] required to serve their time in the maximum security jail without being afforded the opportunity for assignment to minimum security facilities and related outdoor assignments regardless of whether they [met] the criteria applied to male inmates in making assignment to such facilities and programs."⁴⁹ Finally, the court found "it was untrue that the gender classification established by defendants was necessary to carry out either their duty to protect inmates from each

⁴⁶ *Ibid.*

⁴⁷ *Id.*, p. 8.

⁴⁸ *Id.*, p. 9.

⁴⁹ *Id.*, p. 9.

other or their duty not to permit female inmates to sleep, dress, or undress, bathe or perform eliminatory functions in the same room with male inmates."⁵⁰

Not surprisingly, the Court of Appeal affirmed the lower court's conclusion that the disparity in facilities provided to male and female inmates violated the equal protection clause of the state and federal constitutions. Although defendants were not under a legal duty to provide minimum security facilities or outdoor work opportunities to any prisoner, they were under an obligation to end the practice of providing minimum branch facilities and programs to male inmates only, and to apply similar qualifying criteria to all inmates regardless of sex.⁵¹

- **Present Conditions**

Although the number and kind of programs and facilities available to female offenders were increasing, the committee found a noticeable disparity in their availability for men and women. For example, in Los Angeles County, the men in the main county jail facility have access to a library; the women do not.

Typically, as *Molar* illustrates, less restrictive places of confinement for sentenced inmates are not available on an equivalent basis for males and females. Sentenced women must spend their time at a county jail, while sentenced males are able, where appropriate, to go to a low security facility such as an honor camp or ranch. In Los Angeles, for example, at the time this report was initially submitted to the Judicial Council, sentenced men were sent to the Peter Pitchess Honor Camp or the Mira Loma Camp. Female offenders, on the other hand, spent the majority of time, whether sentenced or unsentenced, at the Sybil Brand Institution for Women. The women's side of Mira Loma accommodated only a small percentage of sentenced women, although it was expanding to accommodate more.

The committee visited both Sybil Brand Institution and Mira Loma Camp, and was impressed with the cooperation and assistance of the Los Angeles County Sheriff's Department and the staff at both jail facilities. In their visits to Sybil Brand and Mira Loma, members of the committee found significant differences between the two in the living conditions.

⁵⁰ *Ibid.*

⁵¹ Other state and federal cases have also held that prison inmates are protected by the equal protection clause of the state and federal Constitutions. For example, in *Mitchell v. Untreiner* (N.D.Fla. 1976) 421 F.Supp. 886, 895, the court held that female inmates of a county jail were denied equal protection of the laws because they were denied the opportunity to be trustees, to have contact visitation privileges, to have regular outdoor exercise, and to serve their sentences in a less severe facility than the county jail. In *McAuliffe v. Carlson* (D.Conn. 1974) 377 F.Supp. 896, 902-03, the court held that a prison may not charge only male prisoners for hospital costs. Such a gender-based classification was invalid under the Fourteenth Amendment to the U.S. Constitution because it embodied an outdated notion of the economic status of women in our culture.

Sybil Brand is located near downtown Los Angeles. Although it was built to house only 900 female inmates, at the time of the committee's visit *in excess of 2,000 women were incarcerated there*.⁵² Because of the severe overcrowding, women were placed in cramped dormitories, each holding approximately 200 inmates. There was very little space between each bunkbed and inmates had no facilities to store their belongings. Only four showers and five toilets were available for a dorm of 200 women. As a result, the plumbing was frequently inoperable and needs constant repair.

Due to the overcrowded conditions, the women were given only one set of clothes instead of the two sets they were supposed to receive. There was only one washer and dryer in each dorm. Inmates commented that they had to wrap themselves in a towel or wear their nightgowns while they washed their clothes. In addition, an inmate would not receive a clean set of clothing if she did not exchange the clothes she currently possessed. Therefore, if the inmate did not have something to cover herself while she was standing in line to exchange her clothes, she could either stand there in her underwear or not receive clean clothing. Several women also noted that when they tried to hang their washed clothes on the windows or bedrails to dry, the deputies frequently would take them down.

The jail was so overcrowded that the women had to line up as early as 4 o'clock in the morning to have breakfast, and limits were placed on the amount of time each inmate had to eat. Recreational facilities and educational and training opportunities were also severely limited due to the jail overcrowding. Many inmates were forced to remain in their cramped dormitory surroundings each day without an opportunity to exercise or attend any classes.

The jail was also extremely understaffed. According to a sheriff's department representative, the number of deputies at the facility remained the same while the inmate population more than doubled. This understaffing sometimes created situations in which deputies utilized control techniques that violated the formal policies established by the sheriff's department. As an example, the committee heard independent testimony that the windows in one of the dormitories had been kept open all night as a form of punishment. This created a potentially hazardous condition for one inmate who was eight months pregnant and had to sleep directly under an open window. Other inmates told the committee about "elevator" rides where deputies handcuffed an inmate, took her into an elevator, and beat her. One inmate said she had observed deputies shoving inmates into the walls.

⁵² This and all subsequent observations of jail conditions by inmates and staff are from interviews conducted at the Sybil Brand Institution for Women on Feb. 13, 1989, and at Mira Loma Camp on March 13, 1989.

Conditions at Mira Loma, the predominately male prison alternative, were significantly different. The facility was built to accommodate 700 sentenced inmates; at the time of the committee's visit, it had about 900. Mira Loma is located in the northern section of Los Angeles County on expansive grounds. The inmates were housed in dormitories with considerable space between each bed. There was storage space for each inmate and adequate bathroom and washing facilities. Clothing was usually not a problem and there were a greater number of educational and training programs available than at Sybil Brand.

While it recognized that attempts had been made to improve conditions at Sybil Brand, the committee strongly encouraged continuing efforts for improvement. If other facilities similar to Mira Loma and the minimum security camps for sentenced men were available to sentenced women, they would no longer have to endure the overcrowded conditions at Sybil Brand.

- **Special Programs**

Rebecca Jurado, staff attorney for the ACLU Foundation of Southern California and director of the Women Prisoners' Rights Project, told the committee that San Luis Obispo and San Bernardino counties were planning or would soon open low security facilities for sentenced women. She also noted that the state had some low security programs for women called "fire camps," where sentenced women fight fires. These camps arose out of litigation, in which the state contended that women did not have the skills or desire to do the kind of physical labor demanded by fire camps. However, a state survey discovered many women carpenters, auto mechanics, and female inmates in general who wanted to and could perform physical labor. As a result, at the time this testimony was submitted, there were over 100 beds for women in fire camps.⁵³

- **Juvenile Facilities**

The committee found that placements throughout California were at a minimum for girls. There were especially few ranch, camp, or outdoor programs for girls.

Judge Patrick Morris, then presiding judge of the Juvenile Court in San Bernardino County and co-chair of the Judicial Council Advisory Committee on Juvenile Court Law, provided the committee with eloquent testimony on the disparity between the sexes in the available institutions and placements for those in the juvenile system. Judge Morris stated:

As I've spent the last five years in juvenile justice, I've noted that we have a fairly decent selection of services for our youthful offenders

⁵³ San Diego public hearing transcript, p. 308.

who are male, and for our dependent children who are male. We do not have that same kind of continuum of service to offer to young girls in our county.

In fact, we have only one county-sponsored program, a 20-bed facility for older delinquent girls. We have some 130 to 140 beds for boys that are county funded, and we do not have a single facility in our county of 1.3 million for delinquent girls if we want to place them outside of this 20-bed girls' facility and juvenile hall.

We have to go outside the county, to Pride House in Los Angeles or Martinez, to a program here in San Diego, if a girl is pregnant, she comes to Door of Hope, or to Florence Crittendon in L.A. County, remote from their families, remote from their support systems, we cast them all over the state.

I can usually find within the bounds of our county an appropriate program for young boys, dependent or delinquent, I have nothing for girls. I literally put them all over California, and that's a tragedy for young girls. It almost seems like the young girls are—their problems are treated less seriously than boys, and we tend to remove them last from the family and return them first. *We simply don't give them the same consideration that we do the young boys.* (Emphasis added.)⁵⁴

In a similar vein, Jeffrey M. Reilly, supervising public defender of Juvenile Law in San Diego, told the committee that the girls' rehabilitation facility in that county had 20 beds, compared to the boys' facility which had 200. In addition, Reilly observed, the boys in his county had a relatively short wait from the time their disposition occurred until they were sent to the juvenile camp. He said that girls waited between 30 and 45 days before they actually were allowed to go to the girls' facility. The girls, therefore, stayed an additional month to month-and-a-half at juvenile hall where the conditions were worse.⁵⁵

Sylvia Johnson, Director of Juvenile Hall in San Bernardino County, spoke to the committee from 30 years of experience as a correctional professional, including managing jails, prisons, and juvenile halls, and providing line services as a probation officer. Johnson expressed grave concern about the "benign neglect" suffered by female juvenile offenders:

They have been totally ignored, have not been recognized by research, by lawmakers, by the legal community, and because the majority of our legislative officials are male, in their best intentions,

⁵⁴ San Diego public hearing transcript, pp. 282–83.

⁵⁵ *Id.*, pp. 293–94.

[they] continue to perpetrate many myths with regards to a female offender, and . . . though they attempt sincerely not to be gender biased, reflect the same.⁵⁶

Johnson urged judges to monitor, through site visits, all facilities throughout the state where orders of confinement are made: "It is very important that you be aware of the conditions of confinement, and that you support what is necessary if you, in fact, place people in institutions."⁵⁷

The committee noted and encouraged juvenile court judges to follow the mandate of section 209 of the Welfare and Institutions Code, which requires the judge of the juvenile court at least annually to inspect any jail, juvenile hall, or lockup that is used for the confinement of minors and to evaluate whether it is a suitable place to confine minors.

- **Conclusion**

The committee found a substantial disparity in the availability of local facilities and placements for female offenders. By recommending to state and local agencies that adult and juvenile facilities be made available on an equivalent basis to males and females, the Judicial Council can encourage fair treatment of the female offenders the courts place in these institutions.

3. EDUCATION AND TRAINING PROGRAMS

RECOMMENDATION 4

(a) Request the Judicial Council to recommend to the Department of Corrections, California Youth Authority, and local agencies that the nature and extent of education and training programs in adult and juvenile facilities be augmented so that they are equivalent for males and females (see Title 15 of the Administrative Code, divisions 4 and 7), without diminishing those programs presently available. Education and training programs should include: (1) basic education courses with basic reading and math skills and access to higher educational opportunities; (2) a variety of vocational training without traditional gender classifications and limitations; (3) health education with emphasis on sex education and on prenatal/perinatal

⁵⁶ *Id.*, pp. 247–48.

⁵⁷ *Id.*, p. 247.

care; (4) parenting skills, including programs facilitating contact visits; and (5) drug and alcohol rehabilitation programs; and

(b) Request the Judicial Council to approve in principle and instruct staff and the appropriate committee to draft and publicize a standard of judicial administration, and an amendment to section 24 of the Standards of Judicial Administration for juvenile courts, to encourage each judge presiding over criminal and juvenile proceedings to become personally familiar with the education and training programs in state and local facilities available for males and females.

RECOMMENDATION 4-A

(a) Request the Judicial Council to approve in principle and instruct staff and the appropriate committee to draft an amendment to California Rules of Court, rule 206 to provide that all judges hearing juvenile or criminal matters have the duty to report to the presiding judge any consistent and unreasonable inequalities they may have observed in the availability of equivalent sentencing and disposition alternatives administered through probation departments, facilities (institutions and placement), and education and training programs for adult and juvenile offenders; and

(b) Request the Judicial Council to amend California Rules of Court, rules 205 and 532.5 relating to the duties of presiding judges to require each presiding judge to alert the Administrative Office of the Courts of any deficiencies reported under proposed rule 206 described above.⁵⁸

DISCUSSION AND ANALYSIS

Although educational and vocational opportunities for female inmates and detainees statewide were improving, the committee determined that women's access to these programs was still generally not equivalent to what was offered to men. The lack

⁵⁸ The Judicial Council Subcommittee on Gender Bias in the Courts proposed this additional recommendation after publication of the draft report, and it was adopted by the Judicial Council.

of equivalent programs, the committee found, would result in a long-term negative impact on women's rehabilitation.

The public hearing and jail hearing testimony disclosed the existence of educational and training programs available to male inmates but not available to female inmates. Programs that were available to females frequently followed traditional female stereotypes. At the same time, there were few health and parenting programs for pregnant inmates and incarcerated women or girls with children.

Barbara Bloom, a criminal justice consultant, testified:

The majority of female prisoners are incarcerated for nonviolent, economic-type offenses. Statistics indicate that most female prisoners are young, poor, single parents who have been the head of household, and women of color who are disproportionately represented in our system. A high percentage of female offenders have been physically, emotionally, and/or sexually abused throughout their lifetimes, and also a significant percentage of female prisoners have serious substance abuse problems. Statistics also show us that the majority of female offenders were unemployed at the time of their arrests. Women experience different problems than their male counterparts in prison. The lack of sufficient vocational training programs, and educational programs, and adequate health care have traditionally been problems for women in prison.⁵⁹

- **Disparity in Vocational Training**

Most county and state facilities offer female inmates traditional vocational programs such as sewing and beautician classes. The women are frequently asked to sew the garments for both male and female inmates. Male inmates, on the other hand, are frequently offered classes in auto mechanics, carpentry, plumbing, and animal husbandry.

As an example of the disparity in available programs, one commentator noted that the California Institution for Men operates a dairy program. However, only five miles away, the women's facility operates no such program. These are two facilities, five miles apart, that are both in dairyland. Yet, this kind of program is not provided to the women.⁶⁰

⁵⁹ San Francisco public hearing transcript, p. 243.

⁶⁰ San Diego public hearing transcript, p. 307.

- **Disparity in Educational Opportunities**

With regard to education programs at the state level, it is common to have extensive college programs in the men's institutions. It is also common to have only *one* college program on the women's side, and to have it limited to in-cell study.⁶¹

While touring the female jail facilities in Los Angeles County, the committee learned that, in addition to sewing and beautician classes, a tile-setting program was available at Sybil Brand and an auto-detailing program at Mira Loma for female inmates. Building maintenance and lawn sprinkler installation programs were also offered on a limited basis. These are all programs that women could use to earn a living outside, and they should be encouraged and expanded.

- **Juvenile Programs**

Female juvenile offenders also lack equivalent access to educational and vocational programs.

San Diego Public Defender Reilly stressed the general lack of services for female juvenile offenders. He said that at their county's girls' juvenile facility, there were *no* on-site vocational programs. In addition, the girls' facility had no van to transport the girls to off-site training.⁶²

The lack of equivalent recreational programs for female juvenile offenders was also discussed at the hearings.

Sylvia Johnson observed:

Too often in our budget planning sessions, when we all discuss what we can do and what we cannot do because of dollars, it is obvious and understood that the male athletic program must have the newest baseball equipment, the newest football gear, and the newest basketball equipment. Too often the question is asked, 'What are the girls doing taking out the baseball equipment?' as if there is automatic ownership. *Rarely do you see similar dollar amounts planned for girls' programs in adolescent treatment facilities.* (Emphasis added.)⁶³

⁶¹ *Ibid.*

⁶² San Diego public hearing transcript, pp 293–94.

⁶³ *Id.*, p. 253.

- **Need for Classes on Health Education, Parenting Skills, and Drug and Alcohol Rehabilitation**

As reported in other sections of this chapter, many female adult and juvenile offenders have substance abuse problems. Many of them have had little or no health care, including prenatal care. Frequently, they lack sufficient knowledge to make informed choices about their health care. And, along with a majority of adult female inmates, many of the young women under the supervision of the juvenile court are mothers.

The availability of health education, parenting classes, and drug and alcohol rehabilitation classes at both adult and juvenile facilities is therefore critically important. Experts who testified before the committee not only stressed the need for these classes, but also noted that for many of these women the institutional environment could provide them with the motivation to become educated on these important subjects. This observation was supported by testimony at the jail hearings, where many women indicated an interest in attending such classes.

- **Conclusion**

The committee found that although access to educational and vocational opportunities was improving, a disparity between the availability of these programs for males and females still existed. The Judicial Council can encourage fair access for women by recommending to state and local agencies that operate adult and juvenile facilities that the programs be made available on an equivalent basis.

C. SPECIAL NEEDS OF INSTITUTIONALIZED FEMALES

In addition to reviewing the ways in which males and females are differentially treated by the justice system, the committee considered whether the system meets the special needs of institutionalized females. The committee found that the particular needs of women and young female offenders pose unique challenges to a criminal and juvenile justice system that was designed for males. Although there is a growing awareness of the special needs of female detainees and inmates, there is still a significant need for improvement.

FINDINGS

1. The clothing that is available in both male and female facilities is designed to accommodate the anatomy and physiology of men. There is generally a lack of available clothing specifically designed for a female's anatomy, especially for a pregnant female.

2. Institutionalized females have difficulty obtaining adequate supplies of personal hygiene products, additional clothing, or increased access to laundry facilities during the menstrual cycle.
3. Restraining hardware and shackles available in both male and female facilities are designed to accommodate the anatomy of men. Generally, there is a lack of available hardware and shackles designed specifically for a female's anatomy, especially for a pregnant female.
4. Because the child care responsibilities of institutionalized females are typically different from those of males, programs that allow institutionalized females to remain with their young children, such as provided by the state prison Mother/Infant Care Program under Penal Code sections 3410 et seq., should be expanded. In instances where institutionalized mothers cannot remain with their children, visitation programs which facilitate regular contact should be encouraged.

RECOMMENDATION 5

(a) Request the Judicial Council to recommend to the Department of Corrections and the California Youth Authority and local agencies that the protocols for institutionalized females be re-examined and modified to institute practices which recognize the specific needs of women (see Title 15 of the Administrative Code, divisions 4 and 7). The protocols should specifically address: (1) provision for adequate and appropriate clothing adequate or suitable for female anatomy; (2) provisions for meeting personal hygiene and sanitation needs and increased access to laundry facilities during the menstrual cycle; (3) hardware and shackles of the size, weight, and shape that is suitable for the female form.

The protocols should also address pregnancy-related issues. Limits on the use of leg chains, waist chains, and handcuffs should be encouraged unless there is a security risk. Pregnancy should not limit a woman's ability to earn work credits. Job assignments should be made with a physician's approval. Protocols for expansion of the Mother/Infant Care Program under Penal Code section 3410 et seq., and establishment of similar local programs

for mother and children should be considered. Protocols for visiting with children of inmates should also be considered.

(b) Request the Judicial Council to approve in principle and instruct staff and the appropriate committee to draft a Standard of Judicial Administration, and amend section 24 of the Standards of Juvenile Administration for juvenile courts, to encourage each judge presiding over criminal and juvenile proceedings to become familiar with these protocols.

DISCUSSION AND ANALYSIS

A significant lack of understanding of the specific needs of women who are incarcerated was identified by the committee in the public and jail hearings. Because jails and prisons were primarily designed for men and their needs, the committee found that female facilities tend to follow those models without regard to the particular needs of women.

1. NEED FOR ADEQUATE AND APPROPRIATE CLOTHING

Generally, the committee found that male and female inmates receive exactly the same jail clothing. Although the jail garments were sufficient for most female inmates, the committee identified a need for appropriate undergarments, nightwear, and clothing for both pregnant and smaller inmates. For example, at Sybil Brand, the committee found a shortage of maternity dresses for pregnant inmates, and a lack of pants with expandable waistlines to help keep them warm.

As previously discussed, the committee also found that Sybil Brand inmates were provided with only one set of clothes per week. Because of the lack of adequate clothing, women sometimes had to wear their nightgowns during the day while waiting for access to laundry facilities. In some instances, this meant that an inmate could not participate in a work, education, vocational, or recreation program.

2. SPECIAL HYGIENE PROBLEMS OF INSTITUTIONALIZED FEMALES

The committee heard testimony regarding the special hygiene problems facing institutionalized adult and juvenile females. These problems are exacerbated by a lack of sufficient clothing and regular access to laundry facilities. And, as Karen Schryver, staff attorney at the Prison Law Office, and chair of the Standing Committee on

Prisoners' Legal Services of the California State Bar, explained to the committee, all of these problems are worsened because of overcrowding in women's prisons.

As an example, Schryver discussed a lawsuit she brought alleging the unconstitutionality of conditions at the California Institute for Women. Although that institution was built for 930 people, Schryver reported an actual population of 2,400 women. No additional bathrooms were added for the additional inmates. According to Schryver:

[u]nder the Constitution, under the prohibition [against] cruel and unusual punishment . . . these women should have access to toilets, because they have to go in stairwells, they have to go in buckets, they have to hold their urine, *and they have to beg guards to get to the toilets—beg guards to unlock toilets.*

And they're being told by the guards, 'If you're good, I'll open it for you.' 'If you cross your legs, maybe you won't have to go.' 'Why don't you wait for the scheduled period for the bathroom to unlock?' (Emphasis added.)⁶⁴

As part of the lawsuit, Schryver provided the court with a doctor's declaration and information explaining the differences between men and women. The information provided included some obvious points:

[W]omen don't have open flies in the front of their pants. They can't urinate with their clothed back turned to a group of people. They also need toilet paper. They menstruate, they have additional open orifices that can get infected.⁶⁵

Schryver also described a lawsuit she brought challenging the conditions at a local jail. In that facility, *the women were given one pair of underwear per week*. She explained:

[N]ow that's bad enough if you try to think about living with one pair of underwear a week, but the fact was that I had to sit down with a group of male attorneys and tell them that when you get one pair of underwear per week, and you're on your menstrual cycle, and all you get is sanitation pads, you have to take your underwear off to wash it, and you can't take your underwear off because you have to have something to hold up the sanitary pad.

So I had to argue for two pairs of underwear just so a woman's menstrual cycle could occur in some kind of decent fashion. These

⁶⁴ San Francisco public hearing transcript, p. 315.

⁶⁵ *Ibid.*

types of personal hygiene essentials we take for granted. Nothing is taken for granted in a prison or jail. I'm not even talking about privacy. I don't even want them to have the privacy to go to the bathroom, I just want them to have the toilet.⁶⁶

The combined lack of personal hygiene products, adequate supplies of clothing, and laundry facilities creates unhealthy, unsanitary, and shocking conditions for California's institutionalized females.

3. HARDWARE AND SHACKLES AMENABLE TO THE FEMALE FORM

The committee also heard testimony regarding the need to design restraint equipment which meets the bone structure, body design, and unique aspects of a female offender. Sylvia Johnson, a criminal justice expert, noted that handcuffs, shackles, and other kinds of equipment used in institutional settings to control or move females on a day-to-day operational basis "is rarely designed with the women's unique structure in mind."⁶⁷

Commentators urged limits on the use of handcuffs, waist chains, and leg chains, unless there was a security risk. Restricting the use of such hardware was especially stressed for inmates who are pregnant or in the process of delivering their babies.

4. RESIDENTIAL PRISON AND JAIL PROGRAMS THAT UNITE MOTHERS AND CHILDREN

Research on female inmates and their children is scarce. However, one study, *Prisons and Kids: Programs for Inmate Parents*, sponsored and released by the American Correctional Association in June 1985, surveyed programs in 55 states and 2 federal institutions with a total of 15,337 incarcerated women. The study concluded that parental bonding may play an important role in rehabilitation and is essential to the healthy development of inmates' children.

Based on his findings, the author of the study, James Boudouris, later made the following recommendations:

1. More must be done for inmates' children and families, including having states commit funds to providing child care at correctional institutions.
2. In some cases, especially when placement with another family member is impossible, a child's best interest is served by remaining with his or her mother in a correctional institution.

⁶⁶ *Id.*, p. 316.

⁶⁷ San Diego public hearing transcript, pp. 254-55.

3. Previously existing prison nursery programs should be reinstated and subjected to rigorous evaluation.
4. A retrospective study should be conducted of mothers and children who lived in former prison nurseries operating in Florida, Illinois, Kansas, Massachusetts, New York, and Virginia.⁶⁸

Experts at the hearing corroborated the study's findings and recommendations. For example, Doris Meyer, Coordinator/Parenting Child Abuse Prevention, Correctional Education Division, Hacienda La Puente Unified School District, discussed the need for incarcerated women to retain maximum access to their newborns and infants. Through her parenting classes, Meyer has found the following:

... if we don't bond these mothers to their babies within the first six to eight months, and they stay longer, they get out and get pregnant again because the need to bond and the desire to have a baby is a very biological one and they want that baby, and they want access to that baby. If they cannot get it, they'll have another one.

Meyer cited as a model the Bedford Hills Prison in New York, which permits women who have given birth to keep their babies with them.⁶⁹

The committee also learned that Children's Center at the Federal Correction Institution in Pleasanton, California, was opened in 1978. The Children's Center was developed to provide women and their children a place where they could continue to have ties and strengthen their relationship. There are other children's centers throughout the country.

In addition to the need for new mothers to bond with their infants, other reasons were cited for keeping mothers and their children together. Meyer raised concerns about the safety of the children when a mother goes to jail: in about 75 percent of the cases, the women place their child with a family member. This may not always be the safest place for the child—many of the women in jail have been abused as children. These children are now returning to the home in which the mother was abused.⁷⁰

Meyer explained:

⁶⁸ Boudouris, *Emerging Criminal Justice Issues: Children of Female Prisoners*, Office of Criminal Justice Planning, Research Update Vol. 1, No. 11 (1987).

⁶⁹ San Diego public hearing transcript, p. 241.

⁷⁰ *Id.*, pp. 239–40.

Probably the most pathetic and difficult issue to deal with is the woman who has never admitted her abuse until she got to jail. Now she wants to admit it because her child has just gone back to that family again. Now she's afraid for what is happening to the child. She has to be taken to a telephone and told how to call the hotline, how to turn in her father, her uncle, or her brother, because her child is now in that home.⁷¹

Meyer also stated that if the mother cannot get help from her family, the child becomes part of the dependency system. "If the neighbor has the child when you were arrested, you don't tell the arresting officer you have children, and you hope the neighbor will keep them, because you don't want the child in the system. And that's a real gender bias issue."⁷²

Linda Siegal also recommended that increased efforts should be made to keep mothers and their children together. She suggested that facilities be created which are attached to jails in which both mother and children reside, especially very young children and babies born to a pregnant inmate, "rather than disrupting that bond, and rather than creating even more social problems than you started with, with the woman [committing] the crime."⁷³

Several commentators urged greater expansion of the Mother/Infant Care Program established by the Department of Corrections.⁷⁴ The program, an alternative to state prison, allows women who are sentenced for a term of six years or less to be placed in a community facility with their children ages six and under for the term of their incarceration. The program allows the mother and child to be together in a community facility rather than being separated by a state prison term.

At the time this report was initially submitted, there were *only five* of these community-based programs in the state. Statewide, the Mother/Infant Care Program accommodates between 60 and 70 women. The program provides parenting classes, substance abuse education and treatment, and work furlough opportunities. In addition, it meets the bonding needs of mother and child and helps maintain the mother's parental rights. The program also avoids the need for reunification services while the mother is incarcerated. To participate, the mother must comply with all rules. If she walks away from the program, she is treated as though she had escaped from a regular state prison facility.

5. VISITATION

⁷¹ *Id.*, p. 240.

⁷² *Id.*, p. 243.

⁷³ Sacramento public hearing transcript, p. 287.

⁷⁴ Pen. Code, §§ 3410 et seq.

Even when mothers cannot be housed with their young children, the need for continued contact and visitation between mothers and children of all ages was stressed by many commentators. This is especially true because mothers often lack the same access to their children that fathers have. An attorney who works with male and female prisoners commented:

At the male prisons—I work right outside the gates of San Quentin—I see the visitors, the people line up, friends and family come from all over to see the male members of their family behind bars. Families relocate to the Bay Area so they can visit their family. At the woman's prison, this doesn't happen. Women sit there for their entire term without any visits at all, and the visiting room, unless they're lucky enough to have family in an area, in a local area, is not that crowded.⁷⁵

Doris Meyer observed that the lack of easily accessible visitation at local jail facilities is an issue of gender bias. She noted:

[T]he women and the men that are incarcerated in our facilities have the very common male/female stereotype roles and those kinds of outlooks on life, which means that, by default, children are now a feminist issue. The children of incarcerated parents are the concern and the care of the mother. When you stand outside of a female facility and look at the children, you will find that those children coming to see mother are being brought to her by grandma or sister. When you stand outside the male facility, you find the children that are coming in are being brought by wives, or significant others, biological mothers of the children, that the women are staying with the men, and waiting for the men to get out, but the men are not doing the same for the women, so that the children are really the responsibility of the mother.⁷⁶

Visitation is especially difficult where no-contact policies prevail. Meyer described the situation in jail facilities in Los Angeles County, stating:

[I]n fact at Sybil Brand you look through Plexiglas, you talk over a telephone. So a child brought to see their mother is looking through Plexiglas, fighting with the adult that brought her for who's going to hold the phone, and who's going to get the majority of the 15 minutes on the telephone.⁷⁷

⁷⁵ San Francisco public hearing transcript, p. 313.

⁷⁶ San Diego public hearing transcript, p. 239.

⁷⁷ *Id.*, p. 242.

An exception to the no-contact policy has been made for participants in a unique program called TALK, "Teaching And Loving Kids," operating at both the male and female jails in Los Angeles County. The program allows the children of incarcerated parents to come into jail and have a contact visit with their mother or father.⁷⁸ The child is brought into the jail facility and allowed between one and a half to two hours "to read a book with, to talk with, to cuddle and hug and do Play-doh with mom, and to try to solve some of the problems."⁷⁹

Unfortunately, the program can accommodate few inmates. At the time this report was originally submitted, there were 23,000 inmates in Los Angeles, 3,000 of whom were women, but the TALK program brought in the children of only 75 inmates on the weekend. These inmates visited with about 170 children.⁸⁰

Rebecca Jurado, a specialist on women in prison from the ACLU Foundation of Southern California, noted that San Luis Obispo County Jail allowed contact visits for sentenced women who are low security.⁸¹

Karen Schryver, staff attorney with the Prison Law Office, and chair of the Standing Committee on Prisoners' Legal Services of the State Bar of California, encouraged overnight visitation for female inmates with their children. Reminding the committee that most women prisoners were sentenced for nonviolent crimes, she said the lack of overnight visitation had a significant impact on female inmates because they are the primary caretakers of children.

In addition, because the women's prisons are in remote locations, and the women there are from all over the state, visitation is extremely difficult. A child's visit is made easier if the child can spend the night, or spend a 2- or 3-day period with the parent, because of the great expense for transportation.⁸²

Schryver stressed that the single greatest concern of women inmates is their children. In comparing the male and female prisoners she works with, she observed that the women will write and ask about their children before they will tell her that they do not have toilets or medical care, or have problems receiving visits. In urging efforts to provide greater opportunities for visitation, Schryver said:

[I]f you ever go to a women's prison and stand outside and see a child come in to visit their mother, you will dispel the myth that it's not a good idea to have children visit their parents in prison. *They*

⁷⁸ *Id.*, pp. 242–43.

⁷⁹ *Id.*, p. 243.

⁸⁰ *Ibid.*

⁸¹ *Id.*, p. 311.

⁸² San Francisco public hearing transcript, pp. 320–24.

are overjoyed to see their parent. They are crying, they don't want to leave. This is their parent, whether they're inside or not. (Emphasis added.)⁸³

6. FACILITIES AND VISITATION PROGRAMS FOR JUVENILE MOTHERS

Facilities and programs to help juvenile mothers bond with their children were also recommended.

Sylvia Johnson testified that there was "a dramatic increase in girls who are pregnant in our juvenile detention facilities."⁸⁴ According to her statistics, there were 157,000 school-age mothers in California. She said that programs and alternatives are planned based on the girl's offense, without regard to her pregnancy and medical condition. Johnson urged that the system "begin to be concerned with the health care of those young women who are incarcerated, because it is a captive time, and it is a 'time out.'"⁸⁵ She also called for an increase in and emphasis on placements, specifically of maternity home-type, where there is education and planning for the pregnancy of the adolescent female. "Too often," she noted, "the young girl has no sense of responsibility or understanding of her present state."⁸⁶

Jurado told the committee that a program similar to the state prison's Mother/Infant Care Program, which allows women sentenced to six years or less to be placed in a community facility with their young children, was started for young girls at the California Youth Authority. She encouraged the creation of this kind of program for young women who are in county detention facilities.⁸⁷

The development of visitation protocols would benefit juvenile female offenders who, like their adult counterparts, have difficulty visiting with their children. A deputy public defender expressed concern about the lack of local probation policies for detained girls who want to visit with their babies. This witness said that such visits are set up by probation officers, who "frankly have little concern, or put that on the low list of priorities to set up. I've had girls waiting in juvenile hall for 24-hour placement who haven't seen their babies in weeks, and this is just something that is not on the high list of priorities for probation officers to set up."⁸⁸

As a positive example, the committee heard testimony from Anna Roberts, Deputy Public Defender of Los Angeles County, about the visitation policy at Camp

⁸³ *Id.*, p. 323–24.

⁸⁴ San Diego public hearing transcript, p. 250.

⁸⁵ *Id.*, p. 251.

⁸⁶ *Id.*, p. 253.

⁸⁷ *Id.*, p. 312.

⁸⁸ *Id.*, p. 297.

Scott, a probation camp for girls in Los Angeles County. She indicated that Camp Scott encouraged visits to the camp by children of the residents, and arranged visits any day or time. She quoted the director as stating, "We're like Denny's Restaurant, we're open 24-hours a day."⁸⁹

7. JUVENILE DEPENDENCY CASES—REUNIFICATION

Ann O'Reilly, Director of Family and Childrens' Services for the City and County of San Francisco, testified about her agency's role in the foster care system.⁹⁰ The Department of Social Services, also known as the county welfare department, is responsible for children whose parents are "unavailable"—which increasingly occurs due to incarceration. As Reilly indicated, and as discussed earlier in this chapter, Welfare and Institutions Code section 361.5(a) makes it clear that the brief 12 to 18 month reunification time frame for parents is not stayed by incarceration. However, the juvenile court can order services to the incarcerated parent, unless the court finds it would be detrimental to the child. She noted that her department was seeing an increasing number of orders to provide services to parents while they are incarcerated in order to meet their reunification goal. However, O'Reilly warned:

Failure of correctional systems to acknowledge this time frame and either make available, or permit others to make available necessary services, I think does constitute an additional but invisible sentence on the incarcerated parent who may well permanently lose custody as a result.⁹¹

O'Reilly stated, that the correctional system provided little or no support to a parent trying to reunify. Because most inmates are unable to make a phone call out of the correctional facility, they are not able even to contact their social worker to implement the reunification plan. She expressed concern that, given women's continued role as primary caretaker, a facility's failure to provide services is a form of gender bias.

O'Reilly also stressed the need for residential programs and facilities with space suitable for visitation. Visitation frequency, she noted, is the factor with the highest positive correlation to successful reunification. She called for liberalization of facility policies to permit extensive visitation with children of all ages and recommended a progressive system of contacts between parent and child at the correctional facility. Day visits would progress to overnight visits on-site, to overnight release, then weekend visits, then week-long furlough-type visitation, all in preparation for release and reunification.⁹²

⁸⁹ Los Angeles public hearing transcript, p. 257.

⁹⁰ San Francisco public hearing transcript, pp. 338–44.

⁹¹ *Id.*, p. 340.

⁹² *Id.*, pp. 340–42.

8. CONCLUSION

By recommending that state and local agencies operating adult and juvenile facilities implement practices which recognize the special needs of female inmates, the Judicial Council can encourage fair treatment of the women the courts place in these facilities.

The committee also recognized that the typical female offender, adult or juvenile, will benefit greatly from local community facilities which permit residence or contact with her children. The children will also benefit, as will society.

D. MEDICAL PROBLEMS OF INSTITUTIONALIZED FEMALES

FINDINGS

1. Institutionalized females have difficulty obtaining appropriate medical care, including: prenatal and other pregnancy-related services, medically supervised drug detoxification programs, and voluntary AIDS testing.
2. The development of protocols and guidelines for state and local agencies operating adult and juvenile facilities that specify minimum standards for appropriate medical care would assist institutionalized females in obtaining necessary services.

RECOMMENDATION 6

Request the Judicial Council to recommend to the Department of Corrections, the California Youth Authority and local agencies the adoption of protocols requiring appropriate medical services for incarcerated and institutionalized females, including:

- (a) Full gynecological care;**
- (b) Pregnancy-related services, including (1) pregnancy screening (voluntary) with pregnancy classification upon confirmation; (2) special diet; (3) pre-natal/perinatal care; (4) appropriate housing (lower bunks, medical unit); (5) access to abortion as provided by the laws on this subject; (6) transportation to medical services/hospital; and (7)**

procedures for dealing with pregnancy-related medical emergencies;

(c) Medically supervised drug detoxification program; and

(d) Voluntary, confidential AIDS testing and counseling.

DISCUSSION AND ANALYSIS

Although women inmates and female juvenile offenders have a statutory right to adequate medical facilities and supplies, including pregnancy care, birth control, and abortion services, the committee found that these services were not readily available. Lack of access to necessary medical and hygienic services can create dangerous and unsafe conditions for institutionalized females.

1. STATUTORY FRAMEWORK

Both the Penal Code and the Welfare and Institutions Code contain extensive provisions for hygiene, family planning services, pregnancy care and abortion services. For example, Penal Code section 4023.5 specifically provides incarcerated women with the right to personal hygiene materials during menstruation, to birth control, and to family planning information. In addition, Penal Code section 4023.6 provides pregnant inmates the right to be examined and treated by the physician of her choice. And Penal Code section 4028 makes the therapeutic abortion law applicable to incarcerated females, specifically stating that those:

. . . desiring abortions shall be permitted to determine their eligibility for an abortion pursuant to law, and if determined to be eligible, shall be permitted to obtain an abortion.⁹³

⁹³ See also Pen. Code, §§ 3405, 3406, and 3409 for adult females in state prison facilities and Welf. & Inst. Code, §§ 220–22, 1773, 1774, and 1753.7 for juveniles detained in facilities operated by local agencies and the California Youth Authority.

2. NEED FOR MEDICAL SERVICES

The committee heard testimony that approximately two-thirds of incarcerated women have young children or are pregnant. Statistical data collected at Sybil Brand, the main women's jail facility in Los Angeles County, indicated that at the time this report was initially submitted *75 percent of the women who entered had had no prenatal care prior to incarceration.*⁹⁴ This glaring omission continues in prison. Many of the health concerns unique to women's pregnancy and childbirth are simply not addressed by the state or local agencies responsible for supervising these women while they are incarcerated.

Karen Schryver observed that "There is no female state prison that has a hospital in this state,"⁹⁵ although some kind of medical facility has been planned for the new Madera County prison. This means, she noted, that any kind of medical concern that requires care above an infirmary level must be addressed through an outside hospital. Yet the closest hospital to the California Institute for Women is at least a half hour away. The unavailability of medical care is especially problematic for women who are pregnant and who need emergency services apart from regular medical care.⁹⁶

Many of the inmates at Sybil Brand complained about their lack of access to medical services, including prenatal care and abortion assistance. Approximately 14 to 16 percent of the jail population at Sybil Brand is pregnant at any given time. There are approximately 150 babies born there each year.

One inmate stated that she had to obtain a court order in order to be examined by a physician to confirm that she was pregnant. Until the court order, she was unable to receive any prenatal care at the jail. She noted that once an inmate is identified as pregnant, she is given a yellow wrist band. Pregnant inmates with the yellow wrist band are supposed to receive one extra portion of milk per day and a lower bunk. Because of overcrowded conditions, additional portions of milk and food are not always readily available. Difficulties in obtaining prenatal vitamins were also reported.

Inmates also testified about their inability to obtain statutorily permitted abortions. One inmate, who already had four children, stated that she first discovered she was pregnant about two months after her incarceration. Upon confirmation of her pregnancy, she immediately requested an abortion. She expressed concern that she was now four months pregnant, and still had not received an abortion. Another inmate stated that she was two to three months pregnant when she was incarcerated. She also

⁹⁴ San Diego public hearing transcript, p. 238.

⁹⁵ San Francisco public hearing transcript, p. 316.

⁹⁶ *Id.*, pp. 316–17.

asked for an abortion immediately. Ultimately, she had to have a more complicated procedure because of the delay at the jail facility in obtaining the abortion. Yet another inmate told of her experience in a holding tank, where she was held for six hours with a woman who was hemorrhaging because of a self-induced abortion. The woman, she said, almost died.

Staff at the facility also reported that it was increasingly difficult for the inmates to obtain appropriate medical care. A representative of the sheriff's department stated that about fifty percent of the complaints about the delivery of medical care identified by the inmates were probably true. Even 50 percent of the inmates' complaints is unacceptable, given the statutory mandate and the serious consequences of inadequate prenatal care.

3. NEED FOR DRUG DETOXIFICATION PROGRAMS AND AIDS TESTING

As discussed earlier in this chapter, the majority of incarcerated women have substance abuse problems. The committee heard testimony during the jail interviews about the need not only for drug treatment programs, but also for medically supervised drug detoxification programs. Additionally, because of their own drug use or that of their partners, institutionalized females may be at risk of HIV infection. Inmates at Sybil Brand indicated a desire for and a willingness to obtain confidential testing for AIDS on a voluntary basis. A woman who tests positive may then avoid transmission to others and reduce the likelihood of having a child infected with the virus.

4. NEED FOR PROTOCOLS AND MINIMUM STANDARDS

Medical protocols for correctional and juvenile facilities, including guidelines on abortion and child care, were identified by the committee as necessary to assist pregnant inmates. In addition to ensuring adequate prenatal care, such protocols should address issues relating to housing, such as lower bunks for pregnant women.

In this regard, the committee heard compelling testimony from Ellen Barry, Director of Legal Services for Prisoners with Children. Barry had worked with women in prison for over 14 years, principally focusing on incarcerated mothers and their children.

Barry testified that, as part of a comprehensive settlement agreement, the Department of Corrections had developed protocols for emergency treatment during both high-risk pregnancies and normal pregnancies.⁹⁷ The protocols require the provision of care by an obstetrician/gynecologist, as well as the creation of a pregnancy-

⁹⁷ *Id.*, p. 328.

related health care team and an obstetrical unit for women in advanced stages of pregnancy.

In monitoring the settlement for year and a half, Barry testified that some parts of the system have changed. For example, infant mortality miscarriages have been reduced in the state prison system. However, she stated, "this is really a matter of eternal vigilance, and we are continuing to monitor the situation."⁹⁸

With respect to perinatal care, Barry asked the committee to review the county jail systems as well as the state system. She emphasized the critical need for perinatal care for all pregnant inmates, so as to avoid substantial infant mortality rates and developmentally disabled children. In particular, she recommended "the creation of statewide standards for adequate perinatal care using the American College of Obstetrics and Gynecology standards, as well as our statewide maternal and child health standards, and adapting them to the county jail . . . and the state prison systems, so that the standards function in those environments in an effective way."⁹⁹

The committee also heard testimony from a former perinatal coordinator for the Santa Rita County Jail, who also called for statewide standards for perinatal care to be applied within the criminal justice system. She recommended a case management approach for high-risk, incarcerated pregnant women, one that provides comprehensive medical care and supervision while in prison and after release. Without a case manager, the requests of many pregnant women, including those seeking an abortion, often fall through the cracks. Many times, the women end up not having the abortion because too much time has passed and they lose their chance.¹⁰⁰ This expert also suggested putting together a post-release plan for inmates' reunification with their children.

5. PERINATAL NEEDS OF INSTITUTIONALIZED JUVENILES

The committee heard testimony that young women placed at the California Youth Authority may also lack adequate pregnancy-related services. Linda Siegal stated:

[T]here have been babies that have been born in CYA, they haven't heard the girl crying out for help, and her baby has been born in her cell, and that's really tough for, you know, for anybody, much less a kid. You know, babies having babies.¹⁰¹

⁹⁸ *Id.*, p. 329.

⁹⁹ *Id.*, p. 330.

¹⁰⁰ *Id.*, pp. 344–46.

¹⁰¹ Sacramento public hearing transcript, p. 292.

The lack of appropriate pregnancy-related medical care is also apparent in local juvenile detention facilities. One attorney told of a 15-year-old female client who had taken her father's car without his permission. The young woman was pregnant with twins. She admitted the allegations of a petition under section 602 of the Welfare and Institutions Code, and the juvenile court sustained the petition and issued a camp order.

The attorney testified that the one available camp did not want to take the girl because of her high risk pregnancy, pleading a lack of facilities and nursing staff to provide prenatal care. Meanwhile, the young woman was detained in juvenile hall pending a placement. Despite a doctor's certificate that the young woman was anemic and experiencing a high risk pregnancy, the judge denied the attorney's motion for a change in the dispositional order. Three days later, the young woman miscarried.¹⁰²

The committee also heard about the insensitivity of facility staff to medical problems facing young female detainees. For example, Johnson, the Director of Juvenile Hall in San Bernardino County, observed that girls in juvenile halls throughout the state simply fall between the cracks. They are adolescents who have dropped out of school and who have never received any health education or community-based treatment. They are, she indicated, the most at-risk population imaginable. They come into the juvenile detention facilities desperate for direction and for medical care, yet they fail to receive help. As Johnson put it:

The medical care is there, yet . . . too often, the girl returns from the clinic, and the record will reflect no care provided, girl refused. We need to ask why do they refuse? We still have the doctor, who may not be as sensitive as should be. We have the young woman who is already uncomfortable, very low self-esteem, who is not ready to immediately go into the examining room and undress. We too often have the counseling staff, the nurses, and the physician and other persons who provide in-service say, 'Well, you've had three babies, and you were on the street for three years, why are you so shy about taking off your clothes today?' That is often the scenario and that girl never takes her clothes off and gets the medical care.¹⁰³

Johnson decried the often real misunderstanding the medical profession and the institution staff have about the girl's level of sophistication. The myth is that the girl has been promiscuous and knows everything. Yet, in reality, she has no knowledge of her body, her body's physiology, or basic hygiene. These young women have overwhelming medical needs.¹⁰⁴

¹⁰² Los Angeles regional meeting summary, pp 2–3.

¹⁰³ San Diego public hearing transcript, p. 249.

¹⁰⁴ *Id.*, pp. 238–50.

6. CONCLUSION

By recommending that the Department of Corrections, the California Youth Authority, and local agencies that supervise institutionalized females adopt protocols implementing their statutory rights to appropriate medical services, the Judicial Council will encourage the availability of mandated medical and hygiene services to incarcerated women.

E. SEXUAL ASSAULT AND SEXUAL HARASSMENT SUFFERED BY INMATES

FINDINGS

Females are sometimes the victims of sexual assault and harassment while institutionalized in adult and juvenile facilities.

RECOMMENDATION 7

Request the Judicial Council to recommend to the Department of Corrections, California Youth Authority and local agencies operating adult and juvenile detention facilities (see Title 15 of the Administrative Code, sections 4 and 7), that they implement policies and procedures to assure detainees' safety from sexual harassment and sexual assault perpetrated by (1) guards, counselors or staff; (2) other inmates, detainees in the institution; and (3) inmates with whom contact is made during transportation to and from court and in the courthouse lock-up.

DISCUSSION AND ANALYSIS

The committee heard testimony from inmates and staff at the women's county jail facilities that women are sometimes the victims of sexual harassment and assault by other inmates, guards, or male inmates.

One female inmate told the committee that, in contrast to the men's jail, homosexuals are not separated from the other inmates in the women's facility. A staff member stated that sexual assaults occurred in the women's jail, and that some of the women felt very intimidated and were afraid to discuss the assaults.

Other female inmates complained about being harassed by male inmates while being transported to and from court in county buses. They said that in addition to being verbally assaulted, some men exposed themselves to them.

An attorney at the public hearings testified that she had a woman client in state prison who was raped by a guard. She said the guard was finally prosecuted after he also raped several female guards.¹⁰⁵

By increasing education and undertaking remedial efforts, agencies that supervise females in custody can reduce incidents of sexual assault and harassment suffered by female inmates. The committee therefore recommends to the Judicial Council that it encourage state and local agencies operating adult and juvenile detention facilities to implement policies to assure inmates' and detainees' safety from sexual harassment and assault.

F. JUVENILE DEPENDENCY PROCEEDINGS

FINDINGS

1. A large majority, perhaps as many as 80 percent, of incarcerated women are mothers or mothers-to-be. A significant number of these women have children who are under the jurisdiction of the juvenile court. A substantial number of female offenders in juvenile detentions and placements also have children who are dependents of the juvenile court.
2. Institutionalized females lack adequate information about juvenile dependency proceedings, and are unable to make knowledgeable decisions about the placement and future of their children.
3. Institutionalized parents do not receive proper notice of proceedings and are therefore being denied due process. As a result, they are at risk of not having the opportunity to assert their statutory rights to participate in dependency proceedings, thereby losing custody of their children by default.
4. Institutionalized parents are often not provided with transportation to court or with an adequate opportunity to participate in dependency court proceedings.

¹⁰⁵ San Francisco public hearing transcript, p. 318.

1. PARENTAL IGNORANCE OF DEPENDENCY LAW AND PROCEDURES**RECOMMENDATION 8**

Request the Judicial Council to approve the following changes in principle and instruct staff and the appropriate committee to:

- (a) Revise the informational brochure on dependency law and procedure;**
- (b) Produce an informational video on dependency law and procedure;**
- (c) Draft amendments to the juvenile court rules to require that the informational brochure be given to parents in court; and**
- (d) Recommend to the Department of Corrections, the California Youth Authority and local detention and placement facilities to require dissemination of the brochure and use of the video in their facilities (see Title 15 of the Administrative Code, divisions 4 and 7).**

DISCUSSION AND ANALYSIS

Testimony at both the public and jail hearings indicated that parents lack necessary information about the juvenile dependency process. Because women are usually the primary caretakers, this lack of information has a more significant impact on them. Many of the inmates interviewed stated that they were not represented by attorneys in their dependency proceedings. Even the incarcerated mothers at Sybil Brand and Mira Loma who were represented by attorneys indicated they were unable to call them collect by telephone, and that their attorneys did not come to the facilities to speak with them.

Young juvenile offenders also have difficulty obtaining information about juvenile dependency procedures. Deputy Public Defender Roberts stated:

In the 28 years I have been in the system, I have never, never encountered a girl, a minor mother who had any reasonable

understanding of her rights, or the action of the dependency court in relation to her own children.¹⁰⁶

A parent may lose permanent custody of a child, if the child is a dependent of the juvenile court and remains in out-of-home placement for up to 18 months. (See Welf. & Inst. Code §§, 300 et seq., which was discussed earlier in this chapter.) It is therefore important to have a mechanism for providing incarcerated parents with basic information about juvenile court dependency proceedings.

Section 307.4 of the Welfare and Institutions Code, enacted in 1986, requires the Judicial Council to prepare and make available for distribution an informational brochure on dependency proceedings for parents whose children have been taken into protective custody.

Under section 307.4, the brochure is required to include at a minimum the following information:

1. The conditions under which the minor will be released, hearings which may be required, and the means whereby further specific information about the minor's case and conditions of confinement may be obtained.
2. The rights to counsel, privileges against self-incrimination, and rights to appeal possessed by the minor, and his or her parents, guardians, or responsible relative.

The committee urged that the brochure be revised to reflect any significant changes in dependency law and termination procedures, and that juvenile court rules be amended to provide for distribution to parents who are unable to attend court hearings. Additionally, the committee asserted that an informational video which could be used in adult and juvenile institutions to acquaint parents with their rights would be of great assistance, especially to those parents who are functionally illiterate.

By requesting state and local institutions to disseminate information through brochures or videos, the Judicial Council will help ensure that parents in these institutions have at least a basic knowledge of the proceedings.

¹⁰⁶ Los Angeles public hearing transcript, p. 256.

2. NOTICE TO PARENTS IN CUSTODY OR DETENTION REGARDING DEPENDENCY, DELINQUENCY, AND TERMINATION OF PARENTAL RIGHTS PROCEEDINGS

RECOMMENDATION 9

Request the Judicial Council to approve in principle and instruct staff and the appropriate committee to draft:

(a) Proposed legislation or support legislation introduced which would amend the Welfare and Institutions Code to require the Department of Corrections, California Youth Authority and local agencies responsible for detention of inmates to implement protocols to be followed in notifying and securing the presence of parents confined at such facilities at dependency, delinquency, or termination of parental rights proceedings (see Title 15 of the Administrative Code, divisions 4 and 7);

(b) A Standard of Judicial Administration which would encourage all bench officers and court personnel to become familiar with the procedures for obtaining the release and the return of such inmates. The standard should also encourage the use of low-cost facsimile machines which will speed up the notification process and increase the likelihood of a timely hearing, thus reducing the cost of such procedures by minimizing delays; and

(c) A notice and proof of service form to be used for incarcerated and detained parents.

DISCUSSION AND ANALYSIS

Section 302 of the Welfare and Institutions Code provides that unless their parental rights have been previously terminated, both parents shall be notified of all dependency hearings involving their child, including guardianship and termination of parental right proceedings under section 366.26 of the Welfare and Institutions Code. Parents also have a right to notice of termination of parental rights proceedings under section 7881 of the Family Code (formerly section 232 of the Civil Code)¹⁰⁷ and to

¹⁰⁷ Civ. Code, § 235; now see Fam. Code, § 7881.

notice of delinquency proceedings petitioned under section 602 of the Welfare and Institutions Code regarding any of their minor children.¹⁰⁸

- **Need for Notice and Transportation to Proceedings**

Testimony at the public and jail hearings by both inmates and staff revealed that parents often fail to receive notice of dependency, delinquency, and termination of parental rights proceedings. They also lack transportation to court to participate in these proceedings. Again, since mothers are still the overwhelmingly primary caretakers of young children, the lack of notice and transportation creates a disproportionately severe hardship for female inmates.

Ellen Barry testified that, although there are many social workers in this state who are trying very hard to do the best job possible within the parameters of a difficult system, her agency has documented cases where parents did not receive notice prior to the dependency hearing, or prior to the six- or twelve-month review.¹⁰⁹ In some instances, the agency required to give notice sends notice to the parent with custody, but the parent does not receive the information.

At both the public and jail hearings, the committee also heard of a substantial number of cases in which a parent had received actual notice of the impending proceedings, but was unable to attend because of the unavailability of transportation. Barry noted that it is particularly difficult to have a parent transported to court. Generally, at least three different agencies are involved, requiring complex coordination. In addition, Barry observed, transportation to court for juvenile proceedings involving the prisoner's child is not taken as seriously as transportation to court for the criminal proceeding. Although judges may be willing to continue a case when a problem of notice and transportation is brought to their attention, the delay can be harmful to the child. Delay may interfere with the process of reunification and the development of an effective case plan.¹¹⁰

- **Notice to Juvenile Mothers**

Anna Roberts raised particular concerns about juvenile mothers receiving notice. She pointed out that the children of girls who are on probation are often dependents of the juvenile court. Minor mothers may never receive notice of dependency court hearings, and if they do, they rarely understand them. The mother's transportation to the court hearing is also a problem; and even if she does make it to the courthouse, she may be placed in a waiting room and never called to the courtroom. Roberts recalled:

¹⁰⁸ Welf. & Inst. Code, §§ 630, 660.

¹⁰⁹ San Francisco public hearing transcript, pp. 332–33.

¹¹⁰ *Ibid.*

I can remember one case where I tried to get the juvenile court judge to make an order to the probation officer to take the girl to the dependency hearing. He really didn't believe that the dependency hearings would take place without her presence, and it wasn't until I presented a minute order from the dependency court showing that she had not been there, plus a probation transportation order showing that she had been taken there and left all day, that he finally, I think, understood that indeed, this girl was telling the truth. She had gone, but not gone to the court hearing for her child.¹¹¹

Roberts contrasted the generally abysmal situation for juvenile mothers with Camp Scott, the probation camp for girls in Los Angeles County, where the child care staff transports the mothers to the dependency hearings and waits with them to ensure that they are able to participate in the court hearing.¹¹²

- **Conclusion**

The Judicial Council could significantly increase the likelihood that an incarcerated parent will receive notice and achieve due process by (1) sponsoring legislation requiring the implementation of protocols on notice to parents and transportation to court; and (2) adopting standards which encourage judges to become familiar with the notice and transportation procedures so they can facilitate the appearance of parents who wish to be present at the court hearing.

G. ENHANCING STATUS OF THE JUVENILE COURT

FINDINGS

1. The juvenile court is generally regarded as having a lower status than civil and general criminal courts. As with family law court, a factor relevant to this low status may be the perception that juvenile court addresses "women's problems." In addition, juvenile court is perceived by many as unimportant because the majority of families that come before it are poor, of color, and headed by a single parent, who is female.
2. As a consequence, juvenile court is given low priority within the superior court. This low priority results in heavy caseloads and inadequate facilities and staffing, further discouraging judges from seeking a juvenile court assignment.

¹¹¹ Los Angeles public hearing transcript, pp. 255–56.

¹¹² *Id.*, p. 256.

3. Since women are still typically the primary caretakers of children, juvenile court's low status has a more negative impact on women and their children than on men.

RECOMMENDATION 10

Request the Judicial Council to refer the following issues to its Advisory Committee on Juvenile Court Law for study and recommendations:

- (a) Reevaluation of weighted caseload measures to accurately reflect the complexities of juvenile court law, statutorily mandated multiple review hearings, and intense court supervision required in juvenile dependency cases;**
- (b) Review judicial assignment procedures and inadequate facilities and staffing in juvenile court; and**
- (c) Review methods to enhance status of juvenile court and the judicial assignments to that court.**

DISCUSSION AND ANALYSIS

The committee heard testimony that juvenile court is generally perceived by judges, attorneys, participants, and the public as having a low priority and status within the superior court. As a result of this low priority, judges generally do not seek juvenile court assignments.

1. NEXUS BETWEEN LOW PRIORITY AND LACK OF RESOURCES

Judge Patrick Morris of the San Bernardino Superior Court blamed the low priority given juvenile court on a distinct bias against women and children. He observed that most of the children that come before his court are from broken, mother-led homes.

In commenting about the lack of status for juvenile court within the community, he said:

And the powerlessness of this group is reflected, I think, in the quality of the facilities, and the services offered by most counties. My view is that most of the county planners, the decision-makers are proud of their courthouses, and their structures. They tend to like to build courthouses as a symbol in the community.

That doesn't, however, generally happen with juvenile court. They're often stuck away, in my view, on back lots and behind fences, and they do not feel good about what happens in juvenile law. *It is a true stepchild of the system.*

In our county, we have just built a \$30 million courthouse. We're about to renovate another major court structure. I've been advocating for five years for a long-term need assessment on juvenile justice, and I have yet to even get the assessment study funded by the county board. *That's not a priority item on their agenda.* (Emphasis added).¹¹³

Shelley McEwan, then Deputy County Counsel in Solano County, also linked the lower status given to juvenile dependency court to bias against women and children, stating:

The juvenile court on the dependency side of the court is perhaps one of the areas where the effect of gender bias is simply an assumption of the judicial system, not an inadvertent by-product of discrimination. You have a court in the dependency court that affects women and families in particular. You have an overlay of that, of poverty, you have an overlay of dysfunctional families due to substance abuse, and you have all of the intergenerational problems that come from a background of having been raised, perhaps, in foster care, subject [to] child abuse, domestic violence, sexual abuse, all sorts of problems all coming together so that those problems meet in the dependency court.¹¹⁴

Jane Via, a deputy district attorney in the Child Abuse unit in San Diego, observed that there is a "systemic bias against women which is deflected on to children in our society that results in an enormous lack of resources in the juvenile court. . . ." ¹¹⁵ She further asserted that children are perceived as women's work, and since women are undervalued in our society, children are also undervalued:

Underneath all of this too, it seems to me, is the assumption that because children are women's work, that women should do this, women judges, women clerks, women public attorneys, women social workers, women do it better. I think it's a false assumption, but it's there, and likewise, there are men . . . who just refuse to do dependency cases and are allowed to get away with it. They don't give them importance, they don't think they're important, and they don't care to do them.¹¹⁶

¹¹³ San Diego public hearing transcript, pp. 279–80.

¹¹⁴ Sacramento public hearing transcript, p. 256.

¹¹⁵ San Diego public hearing transcript, p. 272.

¹¹⁶ *Id.*, p. 275

Via noted that many of the cases in dependency court involve families with two or more children. The judicial officer makes separate orders for each child, so if there are 20 cases on the calendar, the clerk may have 36 or more copies of minutes to prepare. Because of the heavy caseloads in dependency court, all participants, including judges, clerks, attorneys, and social workers, are tremendously overworked. Attorneys do not have the time to adequately prepare their cases, and are unable therefore to even interview the child victim before the child is placed in a courtroom and asked to testify. All of this, Via testified, reflects the lack of importance women and children have in the justice system's hierarchy of values.¹¹⁷

In closing, Via summarized her testimony as follows:

[There is an] overall assumption that women do this work better than men, and this is women's work, and therefore, it's not important, and therefore, we don't have to put our time and resources into it.¹¹⁸

2. NEED TO REVISE JUVENILE CASELOAD MEASURES

Solano County's deputy county counsel McEwan expressed concern that juvenile courts have little time to make important decisions about the lives of the children and their families that appear before them. She observed that, *in a two and one-half minute period*, a juvenile court judge is asked to review a risk analysis for a child and determine whether it is safe to return the child home. In that same minuscule timeframe, the judge must also make a determination whether adequate services have been provided.

McEwan attributed the insufficient amount of time to make these important decisions to the low priority accorded juvenile court within the superior court. She stated that juvenile court is "[e]ither a training ground for going on to something better, or . . . somewhere where you expect to find people who can't do anything else, and the juvenile dependency court suffers from all of those problems."¹¹⁹

McEwan questioned the validity of the weighted caseload approach, which allots much more time to criminal cases than to juvenile dependency and domestic law cases. Although she did not question the importance of fair criminal trials, she compared the seven months it took recently to try a death penalty case in her county to the small amount of time allotted for dependency cases, eloquently stating:

¹¹⁷ *Id.*, pp. 273–75.

¹¹⁸ *Id.*, p. 278.

¹¹⁹ Sacramento public hearing transcript, p. 260.

[W]e deal in life and death decisions every single day, and we are not, by this judicial system, allowed the time or the priority to make those same reasoned decisions on those cases.¹²⁰

3. JUDICIAL ASSIGNMENTS

Responses to the Judges' Survey confirm that juvenile court assignments are much less sought after than civil and criminal assignments. When given a choice in the type of judicial assignment, the majority of judges indicated a preference for civil or criminal assignments. Family and juvenile court assignments were the least preferred.¹²¹

4. CONCLUSION

Accordingly, the gender bias committee requested that the Judicial Council transmit this report to its advisory committee on juvenile court law for study and further recommendations. Enhancing the status of juvenile court will improve conditions for incarcerated women and minors who are mothers.

H. JUDICIAL TRAINING

RECOMMENDATION 11

Request the Judicial Council to approve in principle and instruct staff and the appropriate committee to draft:

(a) Standards of Judicial Administration which encourage CJER and local courts to develop training on issues of gender bias in the areas of criminal and juvenile law and issues of gender bias in general. The training should include programs for juvenile court referees;

(b) Standards of Judicial Administration that require CJER and local courts to develop training on issues and techniques which relate to attitudes of gender bias as it pertains to trial and jury selection in matters involving sexual assault, domestic violence and child abuse; and

(c) An amendment to section 8.5 of the Standards of Judicial Administration on examination of prospective jurors in criminal cases to include recommended questions

¹²⁰ *Id.*, p. 262.

¹²¹ Judges' Survey, question 7.

which relate to attitudes of gender bias as it pertains to cases involving sexual assault, domestic violence and child abuse.

DISCUSSION AND ANALYSIS

Making judges aware of gender-related issues previously identified in this chapter and teaching them to recognize stereotypical perceptions and attitudes of gender bias, including those that pertain to trial of and jury selection in sexual assault, domestic violence and child abuse cases, will lessen the opportunity for bias in the criminal and juvenile justice systems.

1. NEED FOR JUDICIAL TRAINING PROGRAMS

As the previous sections of this chapter demonstrate, the committee learned of a number of instances of unequal treatment based on gender. Nonetheless, the results of the Judges' Survey indicated a general lack of awareness of this bias by judges. Specifically, the majority of judges responding to the survey questions on criminal and juvenile law seemed unaware both of the ways in which females receive differential treatment in the criminal and juvenile justice systems and of the instances in which certain policies and practices, which appear gender neutral, actually have a negative, disparate impact on females.¹²²

The committee, therefore, encouraged enhanced training programs to be provided by the Center for Judicial Education and Research (CJER) and local courts for criminal and juvenile law judges. These programs should address gender bias in judicial decision-making regarding: programs and services administered by local probation departments; institutions and placements; education and training programs for inmates; medical and special needs of institutionalized females; and the reunification and notice requirements in juvenile dependency proceedings.

The curriculum should also describe existing sentencing and dispositional alternatives, such as the Eden Program and the Mother/Infant Care Program, discussed earlier in this chapter. Training on female inmates' hygienic and medical needs and on mother-child relations should be included in the curriculum, along with an overview of the Penal Code and Welfare and Institutions Code sections which provide for institutionalized females' personal hygiene, medical care, family planning services, and prenatal care.

2. CREDIBILITY ISSUES AND SEXUAL STEREOTYPES

¹²² Judges' Survey, questions 40–48.

The committee also heard testimony indicating a need for judicial education on women's credibility in the justice system, sexual stereotypes, paternalistic attitudes and lifestyle practices.

For example, judges need to be sensitized to the biased attitudes and sexual stereotypes that may be reflected in probation and social work reports submitted to the court. Professionals in the field testified that probation reports include descriptions of the sexual behavior of women, but not of men. This reporting practice may have a detrimental effect on sentencing and dispositions.

Information in a report about a mother's sexual behavior may also place her at a disadvantage when the court is considering placement of her child in a juvenile dependency hearing. Kathleen West noted that for mothers this information may cast aspersions on her character:

... whereas if a father who has been absent for 18 months shows up on the scene at last, and has fathered 16 children by whatever number of women, that never becomes material to the court record.¹²³

Ana España, a deputy public defender in San Diego County, expressed concern that if a male juvenile offender participated in sports, that involvement was noted favorably in his probation report. However:

If I have a girl [offender] who is very much involved in sports, I don't see that in the probation officer's reports. Or if they're not involved in sports, and girls are involved in equally exciting activities, I don't see that very often in probation officers' reports.¹²⁴

Other gender-related issues include different expectations and perceptions of parental responsibilities and culpability. Because mothers are usually the primary caretakers, they are more often held responsible for their child's negative behavior. In addition, as the parent who usually appears in delinquency court, mothers bear a disparate financial burden when asked to reimburse the county for their child's attorney fees.

Women are also frequently held to a higher standard than men in the dependency court process. Several commentators noted that judges expect more from mothers than they do from fathers in evaluating parenting skills, and in determining if and when a child should be returned to a parent. One attorney, commenting on dependency cases, stated:

¹²³ Los Angeles public hearing transcript, pp. 330–31.

¹²⁴ San Diego public hearing transcript, p. 296.

If a father is perceived to be less than proficient in caretaking, well, gosh, we need to teach him. Nobody ever taught him, and it's kind of okay if a father really doesn't know what to do. But, if a mother shows a deficiency, and I think in some cases it is because of a deprived background educationally, economically or otherwise, she's not given, in many cases, the same kind of benefit of the doubt that she wants to take care of the child properly.¹²⁵

San Diego's Deputy District Attorney Via echoed this concern:

A mother who abandons her child is held liable for that. A father who abandons his child, takes no financial responsibility for that child, provides no actual care of any kind, and often has no contact with that child, may be contacted in the dependency hearing when the child has suffered some kind of abuse and neglect in the mother's home. That person then steps forward and is identified as "the non-offending parent," and we decide to give this child over to this father whose qualifications are highly suspect. A mother who just gives the care or custody of her child to someone else, it seems to me, is held responsible for whatever that other person does to the child in her absence.¹²⁶

Via also told the committee that she sees gender bias in interpreters with cultural biases against women.¹²⁷

Education about the various stereotypes these witnesses described would assist judges in making bias-free decisions.

3. FAIRNESS IN JURY SELECTION

The committee heard testimony from the judge, prosecuting attorney, defense attorney, and jury consultant involved in a significant case in which a woman was charged with the murder of her husband. This case, involving a battered wife, has also been described in the domestic violence chapter.¹²⁸

The crucial issue in *Blackwell* was the fairness of the jury selection.¹²⁹ The woman's defense centered on the "battered woman syndrome." She was nonetheless found guilty of second degree murder and sentenced to prison for 17 years to life. During the course of the appeal, it was revealed that a juror had lied during voir dire. The juror

¹²⁵ Los Angeles regional meeting summary, p. 5.

¹²⁶ San Diego public hearing transcript, pp. 277–78.

¹²⁷ *Id.*, p. 277.

¹²⁸ See *People v. Blackwell* (1987) 191 Cal.App.3d 295.

¹²⁹ Sacramento public hearing transcript, pp. 209–56.

withheld information about her own battering, admitting that her personal experience had influenced her decision to convict the defendant.

The case was retried. The participants in the retrial testified that the manner in which the jury was selected was one of the most important factors to distinguish it from the first trial. The judge incorporated into voir dire a procedure for eliciting potential bias by prospective jurors based on any of their own experiences of violence in their families. The procedure included a written juror questionnaire and sensitive questioning. The jury selection took only one day longer in the second trial than in the first, but the outcome was far different, with the jury deciding to acquit the defendant.

As this case illustrates, the existence of stereotypes about female victims of sexual and physical abuse makes it vitally important in criminal trials to develop a jury selection process that will minimize any potential juror bias.

4. CONCLUSION

Aided by training programs on gender-related issues in criminal and juvenile law, judges will increasingly recognize stereotypical perceptions and bias that may infect both jury selection and probation reports. Furthermore, education will assist judges in recognizing the disparity in available resources, programs, services, and facilities for female offenders. Training will also increase judges' awareness of the unique needs of adult and juvenile female offenders, allowing them to make orders and dispositions that address these needs.

The committee therefore recommended that enhanced training be made available to judges who preside over criminal and juvenile proceedings, and that the standards of judicial administration be amended to facilitate bias-free jury selection. These changes should go far toward eliminating gender bias in the criminal and juvenile systems.

Chapter Eight

Court Administration

I. INTRODUCTION

California court administration is a patchwork of 229 separate court administrative systems,¹ stitched together by a few statewide rules and standards. Thousands of men and women work in the courts; in Los Angeles Superior Court alone, there are 2,622 employees, not including judges. Of these Los Angeles employees, 68 percent are women.² In other courts, the percentage of female employees is even higher.³ Given the high percentage of females in the court work force⁴ and the lack of statewide standards, the potential for gender bias in court administration exists.

Is gender bias reflected in the ways the courts are internally administered? That is the question the committee sought to answer.

California is not the first state to examine its court system to detect gender bias. In 1984, the New Jersey Supreme Court Task Force on Women in the Courts issued a report on its investigation into the nature and extent of gender bias in the court system, including court administration.⁵ In November 1985, as part of its study of gender bias in the New York State court system, the New York State Unified Court System commissioned a report on the effects of its personnel system on nonjudicial female

¹ Judicial Council of Cal., Annual Report (1989).

² Telephone conversation with the personnel dept. of the Los Angeles Superior Court (Oct. 13, 1989).

³ Interviews with six courts were conducted by staff during spring 1989. A summary of the court interviews was prepared and placed in the files of the AOC. This document is titled Summaries of Court Interviews (Apr. 26, 1989).

⁴ In addition to extrapolation from this small sample, the committee has relied on the familiarity of AOC staff with the composition of court staff statewide. Women predominating in the clerical ranks is a well-known phenomenon across the country. For example, the Massachusetts Gender Bias Study found that women account for 90 percent of the workers in clerical-track jobs in the courts. See, Supreme Judicial Court, Gender Bias Study of the Court System in Massachusetts (1989), p. 171 [hereinafter "Massachusetts Gender Bias Report"].

⁵ New Jersey Supreme Court Task Force on Women in the Courts, First Year Report (1984) [hereinafter "New Jersey First Year Report"].

employees.⁶ This report noted that women are disproportionately represented in the lowest-level positions, and that employment practices can have a disparately negative impact on women in these positions. The New York report recommended broader recruitment, monitored hiring, salary grade review, affirmative action, and increased opportunity for training, transfers, and promotions. The New York report also found that female employees carried out male superiors' personal chores and errands and were subject to sexual harassment.⁷ After New York's report, a second report from the New Jersey Supreme Court Task Force on Women in the Courts discovered similar problems, as well as the use of suggestive, overly familiar remarks to female court employees and other inappropriate conduct between attorneys and these employees.⁸ Both states called for increased training for supervisors and judges to sensitize them to manifestations of gender bias in the employment context.⁹

Against this background, in 1986 a special committee of Judicial Council members developed a number of proposals on gender bias, including what are now sections 1, 1.2, and 1.3 of the Standards of Judicial Administration. In Standards of Judicial Administration section 1, subsection 2, judges are called upon to "refrain from engaging in conduct and prohibit others from engaging in conduct that exhibits gender or other bias, whether that bias is directed toward counsel, *court personnel*, witnesses, parties, jurors, or any other participants" (Emphasis added).¹⁰ The special committee also called for further study of other possible manifestations of gender bias in the courts, including "employment practices for state and local judicial branch employees."¹¹

In response, the Judicial Council Advisory Committee on Gender Bias in the Courts was appointed, and a subcommittee on court administration was organized. Its charge was to look at the courts as a place to work, both for employees and for judges.

Unlike New York, the California court system is not a unified system. Every county maintains its own court employment system, making the task of investigating court employment practices in California much more difficult. Nevertheless, the committee undertook a broad investigation of court employment practices that might be affected by gender and an examination of the current status of (1) waiting rooms for children; (2) gender-neutral language in local rules and forms; (3) the response of the Commission on Judicial Performance to gender bias complaints; (4) the judicial selection

⁶ Unified Court System, Office of Court Administration, Report of the New York Task Force on Women in the Courts (1986), pp. 250–251 [hereinafter "New York Gender Bias Report"].

⁷ *Id.*, pp. 252, 263.

⁸ New Jersey Supreme Court Task Force on Women in the Courts, Second Report (1986).

⁹ *Id.*, New York Gender Bias Report, *supra*, p. 263.

¹⁰ Recommendations of the Judicial Council Committee on Gender Bias in the Court System (1986), p. 32 (on file at the AOC).

¹¹ *Id.*, p. 22.

process; and (5) education on gender bias in judicial administration.¹² As shown below, despite the differences in court structure, the California investigation into employment practices resulted in findings that are remarkably consistent with findings in other states.

II. CHAPTER OVERVIEW

The committee found and reported to the full committee that the fragmented nature of California court administration results in varying manifestations of gender bias in every county's employment practices. Despite the variety in employment practices, the committee concluded that it would be relatively simple to reduce significantly the opportunity for gender bias to affect court administration.

First, by adopting comprehensive personnel plans, courts can minimize the effect of gender bias in court administration. Such plans should contain standard provisions on salary setting for gender-neutral job classifications, promotions, affirmative action, sexual harassment, alternative work schedules, dependent care benefits, and pregnancy and parental leaves. Second, judges as well as court employees need the protection of written policies on leaves of absence. Third, courts must respond to the need for care of the children of employees and court participants. Finally, training for *all* employees, as well as bailiffs and others working in the courthouse but technically not employed by the court, on the existence and effects of gender bias is essential to preventing it.

This chapter also covers the committee's recommendations to law schools. The committee urged law schools to adopt employment practices that minimize the effect of gender bias on the environment in which lawyers are educated and to teach courses that address the effect of gender bias on different aspects of litigation.

The text to follow explains the court administration committee's methodology, reports the committee's findings, and makes recommendations based on these findings. The recommendations are based on the following perceived needs:

1. The need for comprehensive personnel plans and modern personnel practices;

¹² As the Advisory Committee on Gender Bias in the Courts reviewed the materials gathered and formulated its recommendations, certain matters were redistributed between subcommittees for report-writing purposes. Thus, some matters that were initially investigated by the Court Administration Subcommittee, such as the need for gender-neutral language in rules and forms, the judicial selection process, training and performance by the Commission on Judicial Performance, and general judicial education on gender bias issues, are discussed in other chapters of this final report. Although the committee investigated judicial assignment, through the Judges' Survey and in in-depth interviews, it found that judges viewed the judicial assignments system as acceptable, for the most part. A few female judges perceived the assignments in their courts to be tinged with bias, but this was apparently an isolated problem. See responses to questions 5a and b in the Judges' Survey, on file at the AOC.

2. The need for certain elements in each court's personnel plan, including:
 - (a) Sound and equitable salary-setting procedures;
 - (b) Revised job classifications and titles;
 - (c) Criteria and standards for promotion;
 - (d) Regular performance evaluations for all levels of employees;
 - (e) An affirmative action plan applying to all court personnel;
 - (f) Job-related training and continuing education programs for all court personnel;
 - (g) A sexual harassment policy;
 - (h) Grievance procedures covering, but not limited to, sexual harassment;
 - (i) A policy statement on professional behavior;
 - (j) An employee benefits plan, which may include: (i) flex-time, part-time, job-sharing, or other alternative work schedules; (ii) disability leave, including pregnancy leave in accordance with Government Code section 12926(c); (iii) unpaid leaves, including parental leave; and (iv) "cafeteria" options to use pre-tax dollars for dependent care and banked sick leave for care of dependents;
3. The need to require judges' compliance with the personnel plan;
4. The need for the Administrative Office of the Courts (AOC) to assist courts in developing and updating personnel plans;
5. The need to assist related agencies, such as the sheriff's and probation departments, in the training of their employees;
6. The need for a comprehensive judicial leave policy;
7. The need for employee child care;
8. The need for children's waiting rooms;
9. The need for law schools to eliminate gender bias both in teaching and in employment practices, and to study the effect of gender bias on different aspects of litigation and other legal work.

III. METHODOLOGY

The committee gathered the specific information it needed through a variety of methods, including the public hearings, regional meetings, and the Judges' Survey.

Although these sources were valuable, courtroom administration was not discussed in detail at the public hearings or regional meetings, possibly because some employees were uncomfortable discussing this subject. Moreover, in contrast to the topics discussed in other chapters of this report, courtroom administration is a subject about which little had been written at the time the committee conducted its research. The committee therefore relied heavily on its own survey and research, including a questionnaire it devised on employment practices and gender bias in the court work environment. In July 1988, court employees from around the state who attended an Administrative Office of the Courts (AOC) workshop titled "Developing Management Skills" received the questionnaire (July questionnaire).¹³ Some of these midlevel employees attended discussion groups conducted by the committee during the conference and discussed concerns about gender bias in the courts. Municipal court clerks attended a special conference in October 1988; they filled out a slightly modified questionnaire (October questionnaire),¹⁴ and some of them attended a drop-in roundtable discussion led by committee members on gender bias issues arising in the court workplace. The results of these two discussion groups have been summarized in memoranda on file at the AOC.

In March 1989, the committee prepared a comprehensive survey about employment practices and gender bias in the courts.¹⁵ Every court in the state received a survey and a request for written materials and court policies on such issues as affirmative action, sexual harassment policies and training, and pregnancy and parenting leaves. The answers to the survey questions were often supplemented by a review of the more detailed written materials. Occasionally, the written materials directly contradicted the answers on the survey; in such cases, the committee relied on the written materials as the more authoritative responses.

Finally, in the spring of 1989, AOC staff conducted in-depth interviews on court employment practices with representatives of six courts. Court executives, court clerks, and presiding judges in the following California courts participated: Alameda Superior Court, Monterey Superior Court, Placer Superior Court, Ventura Municipal Court, Stanislaus Municipal Court, and Santa Cruz Municipal Court. These courts vary in size and in the rural-urban mix of the population each serves. The results of these interviews have been summarized in a memorandum on file at the AOC.¹⁶ Both the interviews and the survey results revealed that greater size and an urban location do not necessarily result in a more generous response to employee concerns related to gender bias.

¹³ A copy of the July questionnaire can be found at Appendix I.

¹⁴ A copy of the October questionnaire can be found at Appendix J.

¹⁵ A copy of the survey instrument can be found at Appendix K, and the tabulated results of the survey at Appendix L.

¹⁶ See *supra*, note 3.

IV. FINDINGS, RECOMMENDATIONS, DISCUSSION, AND ANALYSIS

A. COURT EMPLOYMENT PRACTICES

1. NEED FOR COMPREHENSIVE PERSONNEL PLANS

A comprehensive personnel plan provides both employee and employer with guidelines for workplace life. Both have a shared understanding of the criteria for advancement, the usual amount of training provided, the normal length of pregnancy leaves, the method for reporting sexual harassment, and the foundations of an affirmative action program. Such a comprehensive personnel plan can minimize the opportunities for gender bias to affect workplace decisions. This is especially true in California, which lacks a unified court system, creating the potential for inequality among different counties and sometimes from court to court within a county. By urging each court continually to develop and implement modern personnel practices, often in concert with the other courts within a county, the Judicial Council can encourage both efficient court administration statewide and enlightened responses to the gender-linked problems facing court employers and employees today.

FINDINGS

Two major findings formed the basis of Recommendation 1. First, like New York and New Jersey, California employs predominantly women in the lower-paid court classifications. Because of the sheer number of women in clerk and secretary positions, particular personnel policies can have a disparate impact on women. Policies on training, advancement, dependent care, affirmative action, pregnancy leaves, and sexual harassment are crucial in the lives of women working in the courts; without policies that are fair and clear to management and employees alike, gender bias is able to taint the decision making that will advance or hold back these women.

Second, even within a county, the committee found confusion and uncertainty regarding which personnel policies apply to particular employees. This confusion stems from the different methods by which court personnel come to the courthouse. Judges are elected or appointed. In turn, the judges may appoint administrators, chief probation officers, referees, or commissioners. Some judges may hire their own secretaries, court reporters, or research attorneys, who are then exempt from civil service rules. The elected or appointed county clerk may hire employees through the county personnel department, using the county civil service system, as may the court administrator. But the court administrator might also use a court personnel system with some or all of the employees hired on an "at will" basis.¹⁷ The interpreters and court reporters may be

¹⁷ In July 1989, the California Supreme Court decided that, pursuant to Gov. Code, § 69898, a court could, by local rule, transfer certain court-related duties and the civil service employees who perform them from the control

independent contractors. The bailiffs are usually employees of the marshal, an appointed official, or the sheriff, an elected public official. Are all of these people municipal or superior court employees? In order to improve the administration of justice, the committee believes that people in the same courtroom should be working under the same set of rules.

RECOMMENDATION 1

(a) Request the Judicial Council to endorse the continuing development and implementation of new personnel policies and practices to promote the efficient administration of justice and to eliminate gender bias;

(b) Toward this end, request the Judicial Council to approve in principle and instruct staff and the appropriate committee to draft: (1) amendments to California Rules of Court, rule 205(11), rule 207(1), and rule 532.5, to establish in courts covered by these rules, written court personnel plans consistent with a new Standard of Judicial Administration to be adopted; and

(c) Further amendments to rules 205, 207, and rule 532.5, to require by March 1 of each year a calendar year report to the AOC regarding the contents of the court personnel plan, including data indicating implementation of the plan, such as affirmative action reports.

DISCUSSION AND ANALYSIS

To discover the current range of employment practices and rules in California courts, the committee surveyed presiding judges and court administrators in every court in California in the spring of 1988.¹⁸ The responses received¹⁹ revealed every possible combination of civil service and at will employment. Of the 27 superior courts responding, 8 of them had written court personnel policies or rules, and 17 of them followed the county personnel policies. Of the 33 municipal courts responding, 22 had written court personnel policies or rules and 11 followed the county personnel policies. Of the 10 justice courts responding, 2 had written court personnel policies or rules, and 7 followed the county personnel policies. The other courts responding either had no

of the county clerk to the control of the superior court executive officer. See *Zumwalt v. Superior Court* (1989) 49 Cal.3d 167.

¹⁸ A copy of the questionnaire can be found at Appendix K.

¹⁹ For a tabulation of the responses, see Appendix L.

written personnel policies or adhered to policies embodied in collective bargaining agreements.

In several instances, two surveys from the same court were returned with different information, indicating that one respondent thought the court followed county policies, while the other was aware of independent court policies. Comprehensive personnel plans composed of similar elements would ameliorate this confusion.

Testimony at public hearings also supported the need for comprehensive court personnel plans for every court level. Regarding the superior court level, JoAnne Lederman, former executive officer of the Alameda Superior Court, favored court-approved personnel plans, including procedures for grievances dealing with sexual harassment, performance appraisals, and affirmative action. She described her court as typical, with an overrepresentation of females in clerical positions.²⁰ When she began her position as executive officer, women in so-called management positions were still doing clerical work, and they were being denied the opportunity to make decisions and to supervise others. She also recalled instances of sexual harassment and a dearth of racial diversity at the management level. Instituting a personnel plan, she believes, provided a mechanism for dealing with these problems. She testified:

Rule 207 of the California Rules of Court, which outlines the Executive Officer's responsibilities, indicates that the Executive Officer is responsible for implementing a court approved personnel plan. I don't think this is enough.

The county has policies regarding sexual harassment, discrimination and affirmative action, and I think there need to be rules in some form, from the state, from the Judicial Council, which tell the local trial courts that you will, in fact, have these policies and they are required.²¹

I think there are certain basic guidelines which need to be written and included. Those include leave for both men and women with the birth or adoption of a child. The statement has to be there, stating that these are areas which the Court recognizes need to be dealt with. . . . [T]he statement should not preclude flexibility and ability to deal with a specific situation. . . .²²

Regarding the municipal court level, Edward Kritzman, then court administrator, and Virginia Piper, deputy court administrator, both of the Los Angeles Municipal Court District, testified about the personnel plan for the more than 1,000 employees of that

²⁰ Sacramento public hearing transcript, pp. 41–42.

²¹ *Id.*, pp. 46–47.

²² *Id.*, pp. 54–55.

municipal court. Clerical staff comprise about three-fourths of the work force; the other one-fourth includes data-processing analysts, accountants, and a variety of other administrative and professional positions. The staff include both civil service and non-civil service employees, as well as employees represented by unions.²³ Piper testified that a personnel plan allows administrators to deal effectively with some of the issues that arise in court administration: "I don't think you can deal with the kinds of issues we're talking about today, be they gender, or affirmative action, without looking at the personnel program that one has in the courts, and it's how you deal with people, what kind of programs . . . you have to attract and to develop the employee population."²⁴

Eva Goodwin, a retired judicial attorney with the Court of Appeal for the First District, addressed the need to develop formal policies and guidelines at the appellate court level. In her court, benefits such as job sharing or part-time work and even pregnancy leave are individually negotiated; there are no generalized court policies.²⁵ At the time she testified, no clerks of court in any of the six appellate districts were women, and only one woman was in a supervisory position as a principal attorney. Goodwin stated: "To sum up—to really change the institutional structure and do away with the subtle masking of gender bias, the Appellate Court systems need formal system-wide policies and guidelines on dependency leave, part-time work, flex-time, child care, recruitment, sexual harassment, affirmative action, age discrimination, tenure and seniority."²⁶

The Judicial Council's adoption of the recommendation to have court personnel plans consistent in form across the state will allow the AOC to track the subsequent changes in policies in the courts. This tracking is necessary for two distinct purposes. First, the reporting requirement will allow the AOC to ensure that all courts do adopt comprehensive personnel plans. Second, it will allow the AOC to gather court personnel policies and act as a resource for those courts seeking new ideas in employment practices. During the interviews conducted on site at six courts around the state, AOC staff learned that court administrators wanted the AOC to act as a resource in this way.

In conclusion, the recommendation for comprehensive personnel plans in each court should resolve any confusion and inequity employees may suffer under ad hoc policies. Recommendation 1 will also provide court employers with the opportunity to detect gender bias in their current employment practices and to abolish those policies, replacing them with modern personnel practices that meet the needs of the courts and their employees. Finally, by asking courts to send in personnel plans on an annual basis, this recommendation should encourage courts to review and update the policies yearly.

²³ Los Angeles public hearing transcript, p. 60.

²⁴ *Id.*, p. 61.

²⁵ San Francisco public hearing transcript, pp. 132–33.

²⁶ *Id.*, p. 137.

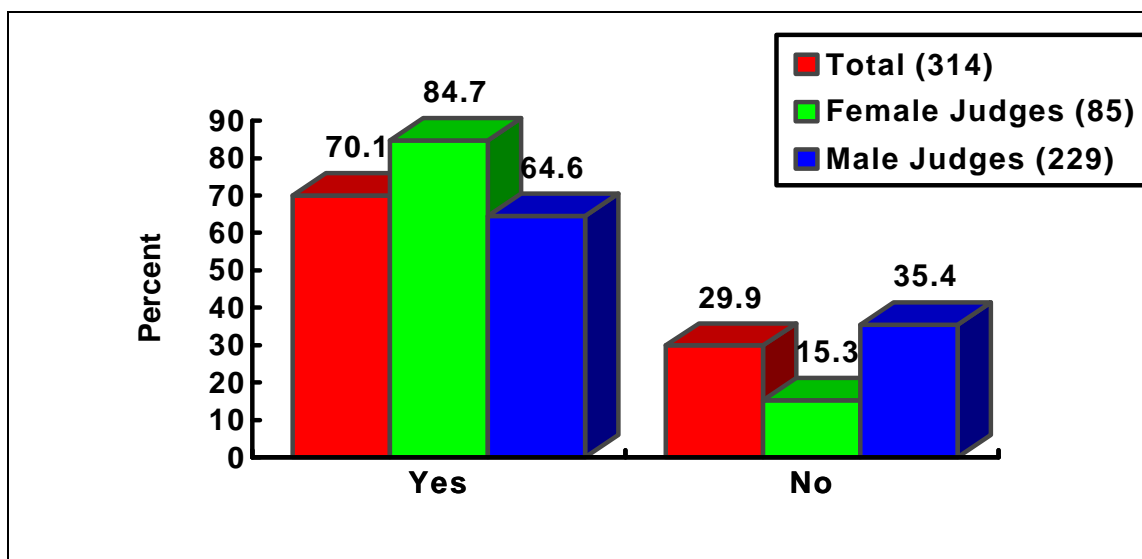
The AOC will act as a clearinghouse and resource for model court personnel practices, enabling all courts to benefit through shared knowledge of preferred personnel policies.

2. ELEMENTS OF A PERSONNEL PLAN

In implementing the first recommendation, courts will need guidance on what subjects should be covered in order to minimize gender bias in employment practices. A Standard of Judicial Administration should give courts guidance on subject matter, while allowing them the flexibility to respond to local conditions. Generally, however, the following subjects would be addressed in a comprehensive personnel plan: (1) salary setting, (2) job classifications and titles, (3) criteria and standards for promotion, (4) performance evaluations, (5) affirmative action, (6) training, (7) sexual harassment policy, (8) grievance procedures, (9) professional behavior, and (10) employee work schedules, leaves, and benefits.

FINDINGS

Question 51a of the Judges' Survey asked, "Would you support statewide personnel guidelines for court employees that deal with, for example, affirmative action, sexual harassment claims and discrimination claims?" As reflected in the figure below, California judges overwhelmingly supported the concept of uniform, statewide personnel guidelines that address such issues.



To eliminate gender bias, the committee found that courts in the 1990s must employ modern personnel policies responsive to the needs of the growing female work force. Yet, the committee found that many courts do not have general personnel plans or more specific policies designed to eliminate gender bias. While many courts may not have the ability to implement costly innovations, working in partnership with the county administration may make possible innovations in areas such as training. The findings and evidence in support of the inclusion of each identified element in a comprehensive personnel plan are discussed separately below.

RECOMMENDATION 2

Request the Judicial Council to approve in principle and instruct staff and the appropriate committee to draft a Standard of Judicial Administration outlining the elements of a court personnel plan, applicable to the courts covered by rules 205, 207, and 532.5, with the explicit proviso that the courts should work closely with the County Board of Supervisors and other county officials regarding compensation, benefits, and conditions of employment for all employees in the court. This Standard of Judicial Administration would incorporate preferred personnel practices and would note that a court plan should, but is not required to, include at least the following items because plans without written guidance on these items create a climate in which bias is more likely to occur:

- (a) Sound and equitable salary-setting procedures;**
- (b) Revised job classifications and titles;**
- (c) Criteria and standards for promotion;**
- (d) Regular performance evaluations for all levels of employees;**
- (e) An affirmative action plan applying to all court personnel in accordance with applicable state and federal law;**
- (f) Job-related training and continuing education programs for all court personnel as appropriate to their**

level, including but not limited to (i) affirmative action concepts and recruitment methods; (ii) sexual harassment detection, prevention, and remedies; (iii) career development, including basic skills, managerial skills, and time off for education; and (iv) gender bias;

(g) A sexual harassment policy;

(h) Grievance procedures covering, but not limited to, sexual harassment;

(i) A policy statement on professional behavior, requiring that all employees must conduct themselves in a professional manner at all times and refrain from offensive conduct or comments that reflect gender bias; and

(j) An employee benefits plan that may, when consistent with court requirements and county policies, but is not required to, include: (i) flex-time, part-time, job-sharing, or other alternative work schedules; (ii) disability leave, including pregnancy leave in accordance with Government Code section 12926(c); (iii) unpaid leaves, including parental leave; and (iv) "cafeteria" options to use pretax dollars for dependent care and banked sick leave for care of dependents.

DISCUSSION AND ANALYSIS

- **Equitable Salaries and Revised Job Titles**

Nationwide, women predominate in the lowest-paid positions in court administration. As courtroom clerks, deputy county clerks, judicial secretaries, and other indispensable personnel, they are required to perform complex tasks and follow ever-changing rules. The compensation allotted for these jobs is not commensurate with the skills and intelligence required. Indeed, the job titles themselves, such as "clerk," no longer accurately describe the jobs done and may be perceived as belittling the value of the work.

In May 1989, Dr. James Shaw of the University of San Francisco and student James Brighton surveyed 189 top court executives and county clerks in California.²⁷ A summary of their findings is in the chart on the next page.

INCOME DISTRIBUTION BY GENDER AND COURT TYPE

<u>ANNUAL INCOME</u>	<u>TOTAL</u>		<u>JUSTICE</u>		<u>MUNICIPAL</u>		<u>SUPERIOR</u>		<u>PERCENTAGE</u>		<u>TOTAL</u>
	<u>M</u>	<u>F</u>	<u>M</u>	<u>F</u>	<u>M</u>	<u>F</u>	<u>M</u>	<u>F</u>	<u>M</u>	<u>F</u>	<u>PERCENTAGE</u>
\$16,000– 20,000	1	14	1	11	0	0	0	3	0.53	7.41	7.94
\$21,000– 25,000	3	13	0	7	0	4	3	2	1.59	6.88	8.47
\$26,000– 30,000	1	16	1	6	0	4	0	6	0.53	8.47	8.99
\$31,000– 40,000	5	19	0	1	1	8	4	10	2.65	10.05	12.70
\$41,000– 50,000	14	25	0	0	8	10	6	15	7.41	13.23	20.63
\$51,000– 60,000	19	13	0	0	11	10	8	3	10.05	6.88	16.93
\$61,000– 70,000	16	11	0	0	10	8	6	3	8.47	5.82	14.29
Over \$70,000	<u>16</u>	<u>3</u>	<u>0</u>	<u>0</u>	<u>5</u>	<u>1</u>	<u>11</u>	<u>2</u>	<u>8.47</u>	<u>1.59</u>	<u>10.05</u>
	75	114	2	25	35	45	38	44	39.70	60.33	100.00

Note: Total N = 189; column percentages by gender do not total 100% due to rounding.

As this survey demonstrates, women are not in the higher-paying jobs—even at the top levels of management. This fact raises a number of questions, including whether the jobs held by women are compensated fairly, unaffected by the gender of the incumbent.

The need for sound and equitable salary-setting procedures surfaced as an issue in the in-depth interviews with six courts around the state. At the time of the interviews, Alameda Superior Court, for example, was in the process of rationalizing its salary setting with new job descriptions. Both the executive officer and the county clerk in Alameda County noted that women were historically over represented in the lower-paid ranks of court employment, and that salaries were not commensurate with the difficulty of the duties assigned to clerks. The county clerk in Monterey County concurred that his 38 female employees do not receive salaries commensurate with their duties. At the time of the interview in Monterey Superior Court, the judges, executive officer, clerk of court, and county clerk were male, and everyone else, in lower-paid jobs, was female. Since that interview, a female executive officer has been hired. Placer Superior Court also follows the pattern of females filling the lower-paid jobs, as does Ventura Municipal

²⁷ Data on file at the AOC.

Court.²⁸ Custodians are paid more than courtroom clerks in Ventura; those interviewed surmised that women are in entry-level jobs because of the undervaluation of those jobs and the concomitant low pay. In Stanislaus Municipal Court, women fill all the clerk and clerical positions. Stanislaus' court administrator noted that courtroom clerks suffer from an extremely depressed salary range.²⁹

A more rational salary level can attract men to female-dominated jobs as well as more fairly compensate women. The Stanislaus Municipal Court clerk position used to command a lower salary than the county clerk position; now the salary is up and a male is in the position. Supporting the link between higher salary and male interest in the job, the South Bay Municipal Court District of Los Angeles County reported more men applying for entry-level clerk positions when the salary was raised.³⁰ Conversely, some in a group of 17 female participants at the AOC conference Developing Management Skills, held in July 1988, believed that the salary level for courtroom clerks stagnated as more women became courtroom clerks.³¹ The perception that "courtroom clerk" was now a female job classification seemed to hold the salary levels down.

The view that job titles are gender-identified is supported by research. In the previously mentioned Spring 1989 study of top court management, Dr. S. Shaw and Brighton inquired about the name of the top positions at each court and the sex of the incumbent. They found that whereas one top male manager was called "clerk," 17 top female managers were called "clerk." Conversely, twice as many men had titles with the word "executive" in it as did women.³²

Revised gender-neutral job classifications and titles, in addition to salary upgrading, will allow women to advance according to skill level. Recently, the Stanislaus Municipal Court established new positions between the lowest level and the supervisory level so that some of its employees could be upwardly classified. In the titles of the new positions, job function is apparent. This emphasis on job function distinguishes the new titles from the general designation "clerk." In Alameda County, women are now moving into higher-level jobs, such as court commissioners, referees,

²⁸ Note that the Ventura Superior and Municipal Courts now have a female court administrator who serves jointly as executive officer of both courts.

²⁹ The participants at a discussion held during the convention of the Association of Municipal Court Clerks of California in 1988 also noted the low entry level of salaries and the overwhelmingly female representation in the clerical classes. See Report on Gender Bias Court Administration Subcommittee Participation in Municipal Court Clerks Conference (Oct. 19, 1988), p. 5, on file at the AOC [hereinafter "Report on Municipal Court Clerks Conference"]. These participants were from Shafter Justice Court and Riverside and Tracy Municipal Courts.

³⁰ Letter from South Bay Municipal Court District, on file at the AOC.

³¹ Report on Gender Bias Sessions at the Developing Management Skills Workshop (July 27, 1988), p. 4, on file at the AOC [hereinafter "Report on Management Skills Workshop"]. The participants came from the counties of Alameda, Los Angeles, Modoc, Riverside, Sacramento, San Diego, San Joaquin, Santa Clara, Shasta, Solano, Ventura, and Yolo.

³² Materials on file at the AOC.

and court executive officers, all of which used to be viewed as "male" jobs. However, some jobs, such as chief probation officer, continue to be male-identified. A job such as this might "open up" if it were given a new name.

In sum, sound and equitable salary setting and revised, gender-neutral job titles form the basis of personnel plans free of gender bias. Moreover, such policies make good sense from a managerial perspective. Valued employees will stay in the courts and valuable prospective employees will be attracted to job opportunities that are not sex-stereotyped and undervalued as "women's work." The gender bias committees of other states, such as Massachusetts, Rhode Island, Maryland, and New York, have also recommended the reassessment of pay grades to assign salaries that adequately reflect the skill requirements and responsibilities of the job.³³

- **Performance Evaluations and Standards for Promotion**

The committee found that the role of gender bias in decisions to terminate or promote can be minimized by regular performance evaluations and by clear standards and criteria for promotion. Discrimination suits based on gender often follow when an employee and an employer do not share an understanding of the performance expected. When there is no objective measurement of performance, the employee may reasonably suspect that gender bias played a part in a decision to terminate or not to promote. Documentation of inferior performance and help in improving performance take the surprise out of a termination. At the same time, standards for promotion allow merit to prevail over the exercise of discretion based on stereotype.

Literature on equal employment opportunity emphasizes the need for performance evaluations with standardized criteria. For instance, in *Equal Employment Opportunity and Affirmative Action. A Sourcebook for Court Managers*, published by the National Center for State Courts, the authors discuss promotions, transfers, and other upgrading.³⁴ They note that practices that ensure equal opportunity for advancement on the job are as important as nondiscriminatory practices in hiring. Safeguards in the use of performance evaluations are necessary, including specification of evaluation criteria, regular and automatic review procedures, use of two or more supervisory appraisals, and presence of women and minorities on the rating panel. Subjective statements in such evaluations should have a job-related basis, and eliminating personal bias should be the goal.

³³ Massachusetts Gender Bias Report, *supra*, p. 180; Rhode Island Committee on Women in the Courts, Final Report (1987), pp. 29–30 [hereinafter "Rhode Island Gender Bias Report"]; Maryland Special Joint Committee, Gender Bias in the Courts (1989), pp. 94–95 [hereinafter "Maryland Gender Bias Report"]; New York Gender Bias Report, *supra*,

p. 263.

³⁴ Sulton et al., *Equal Employment Opportunity and Affirmative Action: A Source Book for Court Managers* (1982).

JoAnne Lederman, former executive officer of the Alameda Superior Court, called performance appraisals "critical and basic to promotions being based on merit."³⁵ Because Alameda Superior Court did not have a performance appraisal program, one was devised and made part of the personnel plan instituted in 1989. The performance appraisal report is a three-page form, including one page for a future objectives and development plan. Strikingly, the "Supervisor's Guide for Employee Performance Appraisal," which instructs supervisors on how to fill out the performance appraisal, is 25 pages long, underscoring the need for an explicit common methodology for supervisors in appraising employees. This common methodology helps to eliminate the effect of subjective biases.

Virginia Piper, deputy court administrator for Personnel and Court Services in the Municipal Court for the Los Angeles Judicial District, echoed Lederman's statements on the importance of documenting work performance as a basis for assessment of candidates under consideration for promotion.³⁶ The performance appraisal program was instituted relatively recently in her court as well.

Despite the need for regular performance evaluation, many courts do not do it. When 35 participants at the 1988 Developing Management Skills conference answered the July questionnaire that asked, as one question, whether performance evaluations were done on a regular basis according to a standard procedure for each job classification, 12 respondents answered that such evaluations were done sometimes, rarely, or never.³⁷

In conclusion, regular performance evaluations and written criteria and standards for promotion will help to minimize the role that gender bias plays in such crucial administrative decisions as terminations and promotions. From a managerial point of view, court employment decisions will be more insulated from charges of bias and employees will benefit from the regular evaluations.

- **Affirmative Action Plans Applying to All Court Personnel**

As the final arbiter in any dispute, the courts must maintain the public's perception of them as fair, just, and honorable. Indeed, the Code of Judicial Conduct cautions judges to act so as to preserve both the appearance and the reality of fairness.³⁸ By the same token, the courts must do more than other public employers in striving to achieve the appearance as well as the reality of fairness to court employees.

³⁵ Sacramento public hearing transcript, p. 43.

³⁶ Los Angeles public hearing transcript, pp. 62–63.

³⁷ Responses from both the July 1988 and October 1988 questionnaire are on file at the AOC. Further references to questionnaire responses will not be footnoted.

³⁸ Former Cal. Code Jud. Conduct, canon 2A; now Cal. Code Jud. Ethics, canon 2A.

Justice O'Connor, in her concurring opinion in *Wygant v. Jackson Board of Education* (1986) 476 U.S. 267, explained the value of voluntary efforts by public employers in meeting their civil rights obligations. She declared:

The value of voluntary compliance is doubly important when it is a public employer that acts, both because of the example its voluntary assumption of responsibility sets and because the remediation of governmental discrimination is of unique importance. See S. Rep. No. 920-415, p. 10 (1971) (accompanying the amendments extending coverage of Title VII to the States) ("Discrimination by government . . . serves a doubly destructive purpose. The exclusion of minorities from effective participation in the bureaucracy not only promotes ignorance of minority problems in that particular community, but also creates mistrust, alienation, and all too often hostility toward the entire process of government").

The committee concurred that voluntary affirmative action in the courts would serve the beneficent purposes outlined by Justice O'Connor. The courts should endeavor to be and to appear fair in their employment practices. For the lower echelons of court administration, fairness might require an affirmative action plan calling for recruiting more men into court employment. Despite the unusual nature of an affirmative action plan for men, the usual rationale would apply—a more diverse court would benefit all. For the higher-paid positions, women would need to be recruited in some courts.

In testimony, both Virginia Piper and Eva Goodwin stressed the importance of recruitment in achieving diversity in a court staff.³⁹ Goodwin particularly emphasized the need for very specific guidelines on affirmative action, noting that the federal courts have already instituted policies and guidelines on affirmative action.⁴⁰

Affirmative action plans would be new for many courts. The court survey discovered that of the 27 superior courts responding, 15 had affirmative action plans and 10 of those clearly applied to managerial personnel. Of the 34 municipal courts replying, 24 had plans, with 17 clearly applying to managerial personnel as well. The Courts of Appeal do not have any affirmative action plans.

In late 1987, the National Center for State Courts determined that of the 32 states responding to its inquiry, 16 had affirmative action plans for their courts and 16 did not.⁴¹ Some states, such as Minnesota, have taken creative approaches to affirmative action, such as "downfilling," that is, filling a job at a lower classification with someone

³⁹ Los Angeles public hearing transcript, p. 62.

⁴⁰ San Francisco public hearing transcript, pp. 134–37.

⁴¹ National Center for State Courts' response to AOC inquiry, on file at the AOC.

not initially qualified for the higher classification and training the person up to the level required.⁴² Some states without affirmative action plans, such as Massachusetts and Maryland, have now had these plans recommended in their states' gender bias studies.⁴³ Those states with affirmative action plans, such as New York, have been asked to devote specific efforts to those titles in which women are underrepresented.⁴⁴

For each court, the creation of an affirmative action plan will provide an opportunity to identify the effects of gender bias on employment in that court. An affirmative action plan provides the impetus to recruit the qualified men and women who might not present themselves at the courthouse door. The courts will be enriched by recruiting these employees into the court work force.

- **Job-Related Training**

The committee found that job-related training can help eliminate gender bias in several ways. First, the women who predominate in the lower ranks of court employment can be provided with an opportunity to train for better, higher-paying jobs previously closed to them. Second, all court personnel can be trained to understand affirmative action, sexual harassment prevention, and manifestations of gender bias in the work force. Third, when given an opportunity on the Judges' Survey to list topics for increased judicial education on gender bias, several respondents mentioned the need to learn more about gender bias in court administration and personnel selection and functions.⁴⁵

Although women are moving up through the ranks of court personnel, their opportunities are limited because many lack not only management skills but more basic skills as well. JoAnne Lederman testified that the women in her office "are bright enough and sharp enough to move up in the organization, but they do not have writing skills, they do not have math skills, and they do not have analytical skills."⁴⁶ She suggested that courts consider giving time off from work to go to community colleges. A related problem is providing a real opportunity for training for single parents. Lederman explained: "[Y]ou can't say, go off to New York for a training program, take a course at night, because they have responsibilities and not enough money to hire somebody to take care of their children, so that some accommodation is going to have to be made so that these women are not left behind."⁴⁷

⁴² See Dosai, *Successful Affirmative Action Tactics in a Large Urban Trial Court* (1981).

⁴³ Massachusetts Gender Bias Report, *supra*, pp. 186–87; Maryland Gender Bias Report, *supra*, pp. 94–95.

⁴⁴ New York Gender Bias Report, *supra*, p. 263.

⁴⁵ Judges' Survey, question 55a, narrative comments.

⁴⁶ Sacramento public hearing transcript, p. 48.

⁴⁷ *Id.*, p. 49.

Lederman also tied training to the performance appraisals, stating that the appraisals are an opportunity to develop a training program to improve the skills that are necessary to move up in management.⁴⁸ Virginia Piper, of the Los Angeles Municipal Court, made the same connection between performance appraisals and development of employees within the work force: "We have at least 28 different types of programs for supervisors and non-supervisors in the court, from generic training on how to do a job, or training in terms of the kinds of things one should be aware of, and being successful in the workplace, such as inter-personal relationship, and down to very specific training."⁴⁹

The survey of employment practices in the courts reveals a wide range in the kinds of and opportunities for training. Most courts offer some free in-service training. Almost universally, however, management has more opportunity to receive training than do the lower echelons of employees. Typically, training opportunity is indicated by a dollar amount available to classifications of employees; the dollar amount is less for nonmanagement employees, arguably those most in need of training. For example, Ventura Municipal Court offered a \$3,000 reimbursement for tuition for management employees, but only \$175 for nonmanagement employees.⁵⁰ Santa Cruz Municipal Court, on the other hand, conducted a needs assessment on training to determine the needs of entry-level employees.⁵¹

Few courts actually pay for extended time off for further training, but some do. For instance, San Mateo Municipal Court follows the county policy. It allows nonmanagement employees to receive educational leaves with pay for up to 65 days during any 52 biweekly pay periods with employer approval, and it also provides for tuition reimbursement for job-related, off-duty education.⁵² Placer Superior Court will sign a contract with an employee that if certain courses are completed (at night), the employee will be awarded the next job available at the higher level for which those courses are necessary.⁵³

Job-related training for judges and managers may take a very different form. For instance, managers and judges need to understand the court's affirmative action plan before recruiting, hiring, and promoting. As noted earlier, judges cited these personnel issues as important for judicial education in answer to question 55a of the Judges' Survey. Anonymous comments on the questionnaires distributed at the Developing Management Skills conference in July 1988, reported that judges also needed training on what questions were illegal in interviews and on what type of remarks could be deemed

⁴⁸ *Ibid.*

⁴⁹ Los Angeles public hearing transcript, p. 63.

⁵⁰ Summaries of Court Interviews, *supra*, p. 11.

⁵¹ *Id.*, p. 15.

⁵² Materials on file at the AOC.

⁵³ *Ibid.*

to create a "hostile environment." Regional meetings also elicited testimony on courts asking illegal interview questions and making punitive transfers of pregnant employees.⁵⁴ Eva Goodwin testified about illegal questions in interviews as well.⁵⁵

Gender fairness is a subject in which all courtroom personnel need training. Participants in the discussion groups at the Developing Management Skills conference discussed the need for education for all levels of employees, including bench officers, concerning gender fairness. In response to question 57e on the Judges' Survey, asking for appropriate remedies for bias by courtroom staff, 85.7 percent of the judges agreed that instituting courtroom staff education would be a good or very good idea. All employees, judges, and managers need to understand the court's policy on sexual harassment and what sexual harassment is. Additionally, all need to understand the personnel plan and its connection to affirmative action concepts and prevention of sex discrimination.

Job-related training is an integral part of any comprehensive personnel plan designed to minimize the effect of gender bias on court administration. Good management requires particularized training in order to retain experienced employees, and to ensure that managers and judges also adhere to court personnel policies. Other states' gender bias committees, such as in Rhode Island and New York, have come to the same conclusion and have recommended more training, educational, and promotional opportunities for women.⁵⁶

- **Sexual Harassment Policy, Training, and Grievance Procedures**

A clearly written sexual harassment policy, training on that policy, and an easily accessible grievance procedure can provide court employers and employees with the tools for a more harmonious coexistence. Without these tools, the rules of behavior are those that individuals set for themselves. Recourse for a timid individual, whether that individual is the accuser or the accused, may be nonexistent. The definition of sexual harassment must be made explicit to both employees and employers and a protocol for dealing with reported incidents must be adopted, if this aspect of gender bias in the courts is to be eliminated.⁵⁷

Policy. The need for a policy against sexual harassment and the leading role of judges in implementing such a policy were discussed in testimony and in the discussion

⁵⁴ Summary of written materials submitted in connection with the regional meetings, pp. 35–36, on file at the AOC.

⁵⁵ San Francisco public hearing transcript, p. 134.

⁵⁶ Rhode Island Gender Bias Report, *supra*, pp. 29–30; New York Gender Bias Report, *supra*, p. 263.

⁵⁷ California law now requires that each employer adopt a policy prohibiting sexual harassment and creating an appropriate complaint resolution procedure. See Cal. Gov. Code, § 12950; eff. Jan. 1, 1993.

group at the Developing Management Skills workshop. Virginia Piper testified: "[W]e have had a variety of situations, anywhere from an employee referring to another as 'honey' and patting one on the derriere, to actually a very serious hostile environment involving sexual statements and references to sex which included the discharge of a long-time court employee."⁵⁸ Piper said that her court has a written policy against sexual harassment that includes a definition section. By contrast, Eva Goodwin noted that the Courts of Appeal have no written policy specifically addressing sexual harassment.⁵⁹ Marilyn Watts, a consultant to the Fresno Commission on the Status of Women, past president of the Fresno chapter of the National Organization for Women, and a former employee of the Fresno County Probation Department, testified about a study conducted in Fresno city and county government on sexual harassment that found sexual harassment in the courthouse.⁶⁰ Another finding of the study was that the policy against sexual harassment must be vocally endorsed by the judges. In other words, the judges and other managers must set the tone that sexual harassment is unacceptable.

Sexual harassment of or by court employees surfaced as a significant problem in the anonymous responses to various questionnaires distributed during the course of the committee's investigation. Of the 34 respondents to questionnaires available at the Developing Management Skills conference in July 1988, approximately 65 percent had experienced or heard about, or both experienced and heard about, inappropriate comments about personal appearance by judges and by co-workers. Roughly 59 percent had experienced or heard about, or both experienced and heard about, judges and co-workers making sexist remarks or jokes that demeaned women. Of the respondents, 53 percent had experienced or heard about, or both experienced and heard about, verbal or physical advances made toward women by judges, and approximately 59 percent had experienced or heard about, or both experienced and heard about, verbal or physical advances made toward women by their co-workers.

Judges themselves corroborated this information. When asked in question 49 on the Judges' Survey whether they were aware of job complaints made during the last three years that included allegations of sexual harassment, 16.2 percent of women respondents and 5.3 percent of the male respondents were aware of such complaints.⁶¹

Despite this awareness of sexual harassment as a problem for court employees, the committee's investigation revealed that many courts do not have effective sexual harassment policies. The responses to the survey on employment practices⁶² indicated that of 27 superior courts responding, 6 had clear substantive policies against sexual

⁵⁸ Los Angeles public hearing transcript, pp. 64–65.

⁵⁹ San Francisco public hearing transcript, pp. 134–35.

⁶⁰ Fresno public hearing transcript, pp. 98–101.

⁶¹ Judges' Survey, question 49, on file at the AOC.

⁶² The tabulated survey results can be found at Appendix L.

harassment, and 20 of the 34 municipal courts responding had clear substantive policies against sexual harassment. For the purposes of this report, statements to the effect that there will be no discrimination based on sex are not considered substantive sexual harassment policies. At least one court sent in a policy that limited its definition of sexual harassment to using authority to control, influence, or affect the employment status of another employee or a prospective employee in exchange for sexual favors.⁶³ While such conduct is patently sexual harassment, the law on sexual harassment provides a much broader definition. Thus, a model policy might well be useful to the courts of the state.⁶⁴

Training. In order to make sexual harassment policies work, the committee also endorsed training about how to recognize and address sexual harassment. Virginia Piper provided a mandatory three-hour training to supervisors and managers twice a year. The training is a formal part of the court clerk training program, because objectionable behavior, Piper testified, "can and does occur between co-workers/peers."⁶⁵ The Alameda Superior Court also trains its management employees and plans to extend the training to all employees. In its response to the survey, the San Benito Justice Court, perhaps expressing the view of many small courts, asked that the AOC provide sexual harassment training rather than expect every small court to produce a training program using its own limited resources.⁶⁶

In the six courts in which in-depth interviews took place, there was often difficulty in ensuring that all employees knew about the sexual harassment policy. Training could be made a part of the orientation of new employees, and refresher courses could be offered for those who may have missed an initial training when the policy was put in place.

Grievance Procedure. In addition to a well-defined policy and training, a grievance procedure is necessary to remedy sexual harassment complaints. In the survey, judges were asked how they thought sexual harassment complaints should be handled. In response to question 50, 39.9 percent of the representative sample of judges advocated an internal court inquiry, which could include a local grievance procedure. Almost as many judges (33.2 percent) felt that sexual harassment complaints should be reported to the Commission on Judicial Performance. The advisory committee's recommendation for a grievance procedure is based on the hope of preventing incidents of sexual harassment. An internal grievance procedure has the benefit of being oriented toward education and remedial action, rather than punishment.

⁶³ Material on file at the AOC.

⁶⁴ For a sample policy from Alameda Superior Court, see Appendix M.

⁶⁵ Los Angeles public hearing transcript, pp. 63–64, 70.

⁶⁶ Material on file at the AOC.

The Los Angeles Municipal Court has a sexual harassment grievance procedure because, as Piper testified, it is especially important to respond quickly to a complaint of sexual harassment for the sake of both the complainant and the accused.⁶⁷ The first response, she said, must be to separate the two employees until a determination of the facts is made. Lederman, of Alameda Superior Court, emphasized that she has an open-door policy as a part of the court's sexual harassment grievance procedure.⁶⁸ The Sonoma County sexual harassment grievance procedure, in use in the Sonoma Municipal Court, designates both a male and a female manager as alternative recipients for reports of sexual harassment.⁶⁹

The question of a grievance procedure becomes more complicated when the alleged harasser is a judge. Before the matter becomes a complaint before the Commission on Judicial Performance, the presiding judge may wish to establish a procedure for receiving complaints about judges who are failing to comply with a sexual harassment policy.

In sum, a significant step toward eliminating gender bias within the courts would be the promulgation of a sexual harassment policy, training on that policy, and a clear, quick grievance procedure with an array of alternatives. Including these components in a personnel plan will not only encourage a healthy working environment but will also reduce potential liability for sexual harassment.

- **Policy Statement on Professional Behavior**

The committee found that many of the incidents of gender bias reported by female court employees involved remarks that degraded these women by being overly familiar or patronizing. While these remarks generally did not rise to the level of sexual harassment, they were inappropriate in a professional setting. A policy statement clarifying that all staff are to be addressed with courtesy, if forcefully supported by the judges,⁷⁰ would go far to eliminate this manifestation of gender bias in the courts.

Public hearing testimony and focus group discussion comments revealed that casual comments or forms of address reflecting gender bias are regularly found in the badinage between court employees and the court participants they encounter everyday. Many employees do not find such comments, whether or not directed at them, amusing

⁶⁷ Los Angeles public hearing transcript, pp. 64–65.

⁶⁸ Sacramento public hearing transcript, p. 53.

⁶⁹ Materials on file at the AOC.

⁷⁰ As previously discussed, judges have a duty to do what they can to prevent gender bias under Cal. Standards of Jud. Admin., § 1. Specifically, that section calls for judges to prohibit others from engaging in conduct that exhibits gender or other bias, whether that bias is directed toward counsel, court personnel, witnesses, parties, jurors, or any other participants. See Cal. Standards Jud. Admin., § 1(a)(2).

or even simply harmless. Lederman testified that the use of ethnic, racial, and sexist jokes is rampant in the court:

Things like that are very offensive to women in the court, they are offensive to some men who work in the court, and they are the type of thing that somehow judges, attorneys, and other staff people need to realize are just not acceptable. Just before this Commission was created, I had one judge who I was in the process of talking to, smile, come closer, pinch me on the cheek and say "You're so cute." Now this is someone who supported me in my position, but at the same time, those types of incidents remain.⁷¹

The committee received numerous letters reflecting inappropriate comments made to and by court staff. For instance, one court employee said that a judge treated her like a child, then asked to have her replaced by a clerk under the age of 30. An attorney commented that court clerks often assume that females asking questions are secretaries, and even if the misconception is dispelled, continue to address the caller in a patronizing and rude manner.⁷²

Attorneys are often the offenders. Lederman noted that at one bench-bar committee meeting, an attorney referred to one of the best clerks in the county clerk's office, who was an African-American woman, as "a real bitch." Regularly, she stated, attorneys call staff "honey," "sweetheart," "dear," and the like.⁷³ Celia McGuinness, a law student at Hastings College of the Law, testified that she thought sexist behavior was tolerated at law school and simply continued in court once the students became attorneys.⁷⁴

Of the 34 respondents to the questionnaire distributed at the July 1988 Developing Management Skills conference, 21 were aware that female court employees were sometimes or often addressed by first name or with terms of endearment when men similarly situated would not be so addressed. Eleven of the same respondents had experienced job-related stress because of the sexist behavior in the workplace. One respondent mentioned that women could be the worst offenders in terms of using "dear" or "sweetheart" when such intimacy was not desired by the female court employee to whom it was addressed.

The Massachusetts Gender Bias Study also revealed demeaning treatment of women by court employees and concluded that "court employees play [a part] in making the courthouse environment an uncomfortable and sometimes hostile place for

⁷¹ Sacramento public hearing transcript, p. 44.

⁷² Response to Cal.Law. survey, received July 18, 1988, on file at the AOC.

⁷³ Sacramento public hearing transcript, pp. 45-46.

⁷⁴ San Francisco public hearing transcript, pp. 128-29.

women."⁷⁵ It recommended that guidelines for courtroom behavior be issued to all court employees, as did the Minnesota and Rhode Island committees on gender bias.⁷⁶ The Maryland Gender Bias Special Committee recommended training in this area.⁷⁷ The New York Task Force on Women in the Courts called for the dissemination of a policy against sexist conduct by court personnel, backed up by administrative action to eradicate such conduct.⁷⁸ Such policies go beyond a mere exhortation to be "courteous."

Paul Li, then director of the Center for Judicial Education and Research, in his testimony, called for a set of rules and standards of courtroom decorum for judges, attorneys, bailiffs, and everyone connected with the court system to follow.⁷⁹ He referred to the testimony of Jill Schlichtman, then chair of the Gender Bias Committee of Queen's Bench, a San Francisco organization of women lawyers, who proposed that judges make a statement at the beginning of a trial encouraging gender-neutral language and behavior as one method to carry out their duties to prevent bias under section 1 of the California Standards of Judicial Administration.⁸⁰

Despite the seemingly ubiquitous nature of degrading and patronizing comments, the survey of court employment practices revealed that almost no courts have any rules or policies regarding professional behavior as reflected in comments or forms of address. One exception was found in the San Mateo County Civil Service rules, which are applicable to the municipal court.⁸¹ Under those rules, discipline may be imposed on an employee for sexual harassment, discrimination, or disrespectful or discourteous conduct toward a county officer or official, another employee, or a member of the public. The American Judicature Society Executive Committee has approved a court employee code of conduct forbidding manifestation by words or conduct of bias based on race, religion, national origin, gender, sexual orientation, or political affiliation in the conduct of service to the court.⁸²

The committee concluded that the general lack of court procedures for dealing with more minor manifestations of gender bias should be remedied through a court policy on professional behavior. This court policy should be articulated in the personnel plan, be applicable to all, and be publicly posted. Professional behavior by and toward

⁷⁵ Massachusetts Gender Bias Report, *supra*, p. 166.

⁷⁶ Minnesota Supreme Court Task Force for Gender Fairness in the Courts, Final Report (1989), p. 104; Rhode Island Gender Bias Report, *supra*, p. 29.

⁷⁷ Maryland Gender Bias Report, *supra*, p. 95.

⁷⁸ New York Gender Bias Report, *supra*, p. 203.

⁷⁹ San Francisco public hearing transcript, p. 105.

⁸⁰ *Id.*, p. 106.

⁸¹ Materials on file at the AOC.

⁸² See Ozar et al., *Ethical Conduct of Nonjudicial Court Employees: A Proposed Model Code* (1989) 73 Judicature 126.

all court participants will advance the administration of justice while reducing gender bias.⁸³

- **Employee Benefits**

The committee found that employee benefits do not meet the needs of the large numbers of parents working in the courts. Labor force statistics⁸⁴ reveal that women still take primary responsibility for dependent care. Accommodating this reality is not only the humane response but also good management. These employees would be difficult to replace. Martin O'Connell, chief of the Census Bureau's Fertility Statistics Branch, noted that a declining birth rate, resulting in a smaller labor pool, means that it will be harder to replace experienced women who leave the work force because of dependent care responsibilities. He is convinced of the need to provide flexible work schedules, employer-sponsored child care, and flexible benefit plans.⁸⁵ The committee agreed that these employee benefits are incentives to keep valuable employees on the job and to enable them to advance.

Flex-Time, Part-Time, and Job Sharing. The California court system must cope with the reality of working women with dependent care responsibilities because of the large number of female employees in the system. As the primary caretakers, these women have pressing needs. In a Boston University study,⁸⁶ married male parents reported that their wives spent two to four times as many hours a week on child care as they did. The same study indicated that women employees are twice as likely to stay home with a sick child (65 percent) as male employees (32 percent). In a widely read 1989 article in the *Harvard Business Review*, business consultant Felice Schwartz said that "[t]he key to managing maternity is to recognize the value of high-performing women and the urgent need to retain them and keep them productive."⁸⁷ She endorsed all the flexible scheduling options but believed that job sharing is the most promising alternative for the future.

⁸³ The Cal. Code of Jud. Ethics now contains an ethical duty to refrain from and prevent bias. See Cal. Code Jud. Ethics, canons 3B(5) and 3B(6).

⁸⁴ According to statistics from the Women's Bureau and the Bureau of Labor Statistics of the U.S. Dept. of Labor, more women than ever are in the work force while also caring for dependents. For example, in 1985, the labor force participation rate for mothers with children under the age of one climbed to over 48 percent, and 54 percent of mothers with husbands present were in the work force. The number of households headed by single mothers is also rising; by 1985, 21 percent of all households with children under 18 were headed by a single mother. Additionally, the Dept. of Labor Women's Bureau projects that women will make up 60 percent of the work-force growth by the year 2000. See U.S. Dept. of Labor, Office of the Secretary, Women's Bureau, *Employers and Child Care. Benefiting Work and Family* (1989), p. 1, on file at the AOC.

⁸⁵ A.P. wire story, June 15, 1988.

⁸⁶ Burden and Googins, *Boston University Balancing Job and Homelife Study: Managing Work and Family Stress in Corporations* (1986).

⁸⁷ Schwartz, *Management Women and the New Facts of Life* (1989) 65 Harv.Bus.Rev. 72.

Piper of the Los Angeles Municipal Court District and Lederman of the Alameda Superior Court emphasized the utility of a flexible scheduling system to handle various employee problems.⁸⁸ The Los Angeles court uses three schedules: flex-hours, part-time for some assignments, and a week-on, week-off job-sharing program for court reporters. The Alameda Superior Court is pleased with the results of using flex-time and job sharing for court reporters. While the Alameda program is not limited to female users, most of the reporters are female, and most take advantage of the program for child care reasons.

Cheryl Peterson, a research attorney in the San Diego Superior Court, stated that the Superior Court does not have any part-time work option for attorneys, although a part-time option is available to court clerks and reporters: "I will submit that a gender bias issue arises when the female employees who work in the traditional male job of an attorney are denied the part-time option while the part-time option is available to female employees who work in the traditional female jobs of clerks and reporters."⁸⁹

Eva Goodwin, a retired judicial attorney from the First District Court of Appeal, pointed out that job sharing can be economically beneficial for the court. Often, each attorney works three days, and the court receives six days of work for the cost of five plus benefits for both people.⁹⁰ Research attorneys at the First and Fifth Districts are job sharing very successfully.⁹¹

The committee's investigation revealed that California trial courts are not wholeheartedly embracing the flexible scheduling concept. Of the 27 superior courts surveyed, only 15 used flex-time, part-time, or job-sharing work options for any level of employees. Of the 34 municipal courts, 20 offered these options. Notably, only 5 superior courts and 6 municipal courts unambiguously extended the options to managers. In contrast, the Oakland-Piedmont-Emeryville Judicial District in Alameda County has a job-sharing policy that includes written findings when a job-sharing request is denied and an appeal to the Board of Supervisors.⁹² Of the 33 court employees responding to the questionnaire distributed at the Developing Management Skills conference, 23 indicated that no part-time or flex-time option was available in their courts, and 28 indicated that no shared shift option was available.

With one exception, the courts interviewed in-depth tended to be cautious in their use of work time options. Several had tried flexible scheduling and abandoned the experiment, claiming that understaffing made it impossible to cover all the hours the

⁸⁸ Los Angeles public hearing transcript, pp. 65–66; Sacramento public hearing transcript, p. 50.

⁸⁹ San Diego public hearing transcript, p. 53.

⁹⁰ San Francisco public hearing transcript, p. 133.

⁹¹ Material on file at the AOC.

⁹² Material on file at the AOC.

court was open. These courts did not have employees who could serve in a variety of positions.

However, Santa Cruz Municipal Court, with more than 80 employees, permits flex-time, job sharing, and part-time work. The court in Santa Cruz makes a tremendous effort at cross-training so that employees can function effectively in a variety of positions. At the time of the interview, the acting court administrator, Margie Bishop, was working four nine-hour days and taking half a day off every week. Traffic supervisors were on a four-day, ten-hour plan. Five positions are shared, and Bishop declared that the job sharing was extremely beneficial by providing coverage for vacations and pregnancy leaves. Her court has an average of four pregnancies a year. Santa Cruz Municipal Court also has two part-time positions (one of which is in management), and one half-time receptionist, with no noticeable decrease in efficiency.

Thus, for those courts with sufficient staff, experimentation with flexible scheduling, job sharing, and part-time work may prove helpful to both employees and employers. The experience of the Santa Cruz Municipal Court suggests that the success of such an experiment may depend on the approach taken by management in advocating cross-training. Both the flexible scheduling and the training will keep productive employees in the court and allow them to advance, despite child-rearing responsibilities.⁹³

Pregnancy and Parental Leave. In California, Government Code section 12926(c) requires most employers to grant an unpaid disability leave with reinstatement rights of up to four months to pregnant women.⁹⁴ Additionally, most employers must participate in temporary disability insurance programs that provide disabled male and female employees with partial wage replacement for up to 26 weeks. Because of the uncertain status of the courts under Government Code section 12926(c), it is unclear whether the courts must follow this state policy. Nonetheless, the committee found that allowing a pregnancy disability leave, whether paid or unpaid, would be both responsive to the needs of the courts' overwhelmingly female court work force and aid them in retaining competent long-term employees. According to United States census data, from 1981 to 1984, 71 percent of women who received maternity benefits returned to their jobs; in contrast, of the women who did not receive any maternity benefits, only 57 percent returned to work.

⁹³ In 1995, the AOC formally adopted an alternative work schedules policy for AOC and Supreme Court employees. See *California Judicial Branch Personnel Policies and Procedures Manual*, § 3.45.

⁹⁴ It is surprising that there was no federal policy on pregnancy leave until recently. Every industrialized nation with the exception of the United States has long provided some parental leave option for working parents. See Kamerman and Kahn, *Family Policy: Government and Families in 14 Countries* (1978); *Maternity Leave Policies: An International Survey* (1988) 11 Harv. Women's L.J. 171. After many years of pending before Congress, the Family and Medical Leave Act was finally signed into law by President Clinton in late 1993.

The committee's investigation revealed that the written policies of the California courts on pregnancy vary, and many are limited in scope. Of the 27 superior courts responding to the committee's survey, 16 had pregnancy leave policies, with only 2 unambiguously providing a paid leave, although 4 allowed use of sick leave or vacation. Of the 34 municipal courts responding, 28 had pregnancy leave policies, with 2 of them clearly providing a paid leave and 11 including use of sick leave or vacation time. Reference to the tabulated survey results⁹⁵ demonstrates that the amount of time available for a pregnancy or parental leave varies tremendously from court to court, ranging from as little as six weeks to as much as a year. Pay status is equally variable. Indeed, Cheryl Petersen, a court research attorney, testified that although court clerks are covered by California State Disability Insurance, research attorneys have inferior coverage that may result in no paid time off while disabled.⁹⁶

Parental leave is a newer concept, allowing both fathers and mothers time to stay home and bond with a newborn or newly adopted child.⁹⁷ Six of the superior courts responding to the survey had a parental leave, but none of these included adoption or was paid. Two of the parental leave provisions were gender-neutral. Nine of the municipal courts provided a parental leave, with only one including adoption leave, and only one had a paid parental leave. Three of the parental leave provisions were gender-neutral. Lederman testified that the four-month parental leaves allowed by the Alameda Superior Court have not presented a problem in administration of the court.⁹⁸

Although most courts do not have provisions for parental leave, the survey did not identify which courts with unpaid leave of absence policies allowed a leave of absence for parenting. For instance, an in-depth interview with Placer Superior Court indicated that there is a four-month pregnancy leave, but no official parental leave. However, Placer Superior Court has a liberal policy on leaves of absence without pay. A leave of absence can be for up to two years, with vacation utilized first. Piper testified that the Los Angeles Municipal Court District allows women to use paid sick leave, then unpaid sick leave, and then to take an unpaid leave of absence.⁹⁹

By having a written parental leave policy with a right to return, the discretion to "punish" an employee for making use of leave is diminished.¹⁰⁰ Given the reality that

⁹⁵ See Appendix L.

⁹⁶ San Diego public hearing transcript, p. 50.

⁹⁷ Psychological literature has strongly supported time for parent-infant bonding. For instance, in Gamble and Zigler, *Effects of Infant Day Care: Another Look at the Evidence* (1986) Amer. Orthopsych. Assoc. J. 26, the authors conclude that paid infant-care leaves are the most attractive alternative to infant day care to meet the psychological needs of both parents and children.

⁹⁸ Sacramento public hearing transcript, pp. 51–53.

⁹⁹ Los Angeles public hearing transcript, p. 69.

¹⁰⁰ Review of the court policies received as a result of the survey raised two issues: first, whether parenting or

mothers make the most use of leaves for pregnancy and parenting, any career disincentives for exercising leave options fall most heavily on female employees. For instance, the San Diego Superior Court provides a one-year parental leave, but, testified research attorney Cheryl Peterson, it may be granted without the right to return and without any option to continue life and health insurance benefits.¹⁰¹ Eva Goodwin, retired research attorney, testified that although the *Judicial Branch Employee Handbook* says that there is a leave of absence for one year without pay for birth or adoption, in practice the leave depends on what can be worked out with the judges.¹⁰² The Alameda Municipal Court does not allow an employee the opportunity to file a grievance about whether a department head made his or her "best effort" to reinstate a returning mother.¹⁰³ If such a decision is not subject to the grievance procedure, it may undermine the reality of a right to reinstatement after a maternity leave.¹⁰⁴

The questionnaire distributed at the Developing Management Skills conference in July 1988 asked whether full use of available pregnancy leave could impede advancement. While most respondents had no experience on which to respond, a quarter of the respondents thought making full use of pregnancy leave often or sometimes would impede advancement.¹⁰⁵

In today's world of a diminishing demographic pool of workers and an increased number of women in the work force, courts must respond with fair, formal, written policies for pregnancy and parenting leaves. These policies must include return rights that allow the court work force to combine work and family life. California will not be alone in implementing such policies. Other states' gender bias committees, such as the one in Maryland, have called for family leave policies with job return guarantees.¹⁰⁶

other leave should affect an employee's anniversary date; and, second, whether sick leave, vacation leave, and unpaid leave could be combined to enable an employee to be eligible for paid benefits for a longer period. These questions are noted here but are not meant to be resolved by the standard minimum policy proposed. Each court should consider these issues in adopting a leave policy. Some courts have developed innovative methods for accommodating the needs of employee-parents who are adopting or are nursing infants. Sonoma Municipal Court, for instance, allows the use of sick leave for adoptions, but others do not. Santa Barbara Municipal Court allows newborns to be brought to the office for nursing for four months. Cheryl Peterson testified that one research attorney also brought her newborn into the office for four months (San Diego public hearing transcript, p. 50). It was clear that this arrangement was not pursuant to any written policy. Courts may wish to consider these issues as well in developing leave policies.

¹⁰¹ San Diego public hearing transcript, pp. 51–52.

¹⁰² San Francisco public hearing transcript, p. 133.

¹⁰³ Materials on file at the AOC.

¹⁰⁴ In 1995, the AOC formally adopted a comprehensive parenting leave policy for AOC and Supreme Court employees. See *California Judicial Branch Personnel Policies and Procedures Manual*, § 4.1.10.

¹⁰⁵ See Report on Municipal Court Clerks Conference, p. 5.

¹⁰⁶ Maryland Gender Bias Report, *supra*, p. 95.

Cafeteria Plan Benefits and Child-Care Help. Cafeteria plan benefits involve offering employees a range of benefit options from which to choose. Some employees with children can choose the option of using pre-tax dollars to pay for dependent care (allowable under Internal Rev. Code, §125), while childless employees can choose other benefits. A cafeteria plan could also allow employees to use sick leave to care for their sick children.

Despite the utility of cafeteria plan benefits, most courts do not offer them.¹⁰⁷ Of the 27 superior courts responding to the survey, 5 offered a cafeteria plan, though it was unclear whether these benefits were only available to managers. Of the 34 municipal courts responding, 6 had a cafeteria plan and it appeared that most of these were available only to managers. Yet, Alameda County Superior Court reported no problems with its cafeteria program. It has recently become available to Court of Appeal employees as well. Courts, counties, and unions may wish to investigate this kind of benefit plan.

The committee found that affording pretax deductions to pay for child care, providing nearby child care facilities, and allowing sick leave to be used when children are ill facilitates the retention of women in the court work force.¹⁰⁸ Although most children have two parents, it remains a truism that the burden of child care falls primarily on the mother. Arlie Hochschild's book, *The Second Shift*, amply documents this phenomenon, as did the Boston University study mentioned earlier.¹⁰⁹ The Women's Bureau of the United States Department of Labor has found that women employees are twice as likely to stay home with a sick child as are male employees. In 1988, 56 percent of women with children under six years old were working or looking for work.¹¹⁰ Nationally, in California, and in California courts, the need to assist employees with child care must be recognized and met.

During the committee's investigation, child care issues repeatedly surfaced as concerns of female court employees. The participants at the discussion groups at the Developing Management Skills conference all agreed that the issue of child care is critical because the lower-paid staff cannot afford the child care that is currently available. This has an adverse impact on staff productivity and morale. These participants specifically called for fringe benefits relating to child care, such as use of

¹⁰⁷ See Appendix L.

¹⁰⁸ In a survey conducted by the National Employer-Supported Child-Care Project, published in 1984, 90 percent of the 178 companies responding said that the child-care service their businesses offered had improved employee morale, 85 percent said their ability to recruit had been affected positively, and 85 percent noted more positive public relations.

¹⁰⁹ Burden and Googins, *supra*; see also Schwartz, *supra*, p. 4: "The capacity of working mothers to function effectively and without interruption depends on the availability of good, affordable child care."

¹¹⁰ Massachusetts Gender Bias Report, *supra*, p. 193 (citing U.S. Bureau of Labor statistics).

sick leave for sick-child care.¹¹¹ The same issues, affordable child care and use of sick leave for sick children, were echoed by the participants in the groups at the Association of Municipal Court Clerks meeting in October 1988.¹¹²

The availability of sick leave for sick-child care varied radically from court to court. Some courts allow the use of sick leave to allow a parent to inspect potential child-care facilities (Monterey Superior Court and San Leandro Municipal Court); others allow only three days for sick children, after which vacation must be used (Glendale District of the Los Angeles Municipal Court); and still others allow a certain amount for routine children's medical and dental appointments and unlimited amounts for children's illness (Oakland-Piedmont-Emeryville Municipal Court District in Alameda County does not limit use of sick leave for children's illnesses; Placer Superior Court has a 100-day limit).¹¹³ Thus, employees are subject to widely varying policies on this crucial issue.

Offering pretax deductions for dependent care and sick leave for care of sick dependents would undoubtedly require some initial administrative readjustment by the courts. The cost of such a readjustment will generally be neutralized by the long-term benefits of keeping experienced employees, boosting morale, and responding humanely to the needs of employees.

Alternative work schedules, pregnancy and parental leave, and benefits defraying the cost of child care are all integral parts of a meaningful response to the problems faced by the predominantly female work force in the courts. However, the committee recognized that the courts will respond to these problems in an individual manner, according to the needs of the courts and the resources available from the counties. The Standard of Judicial Administration proposed in Recommendation 2 would also recognize the fiscal constraints on many courts.

In conclusion, Recommendation 2 asks the Judicial Council to adopt a Standard of Judicial Administration outlining the elements of a court personnel plan that would help diminish the impact of gender bias on court administration. Standards are, of course, hortatory in nature. While some of the elements suggested are simply sound business practices that should be adopted by every court, other elements may be costly. The purpose of the standard is to urge courts to consider including these elements in their personnel plans in some form, and to explore the possibility of providing some of the suggested benefits in conjunction with county government, which would make providing them more cost-effective.¹¹⁴

¹¹¹ See Report on Management Skills Workshop, *supra*, p. 3.

¹¹² See Report on Municipal Court Clerks Conference, *supra*, p. 5.

¹¹³ Materials on file at the AOC.

¹¹⁴ See Cal. Standards Jud. Admin., § 27 (adopted July 1, 1991).

3. NEED FOR JUDGES TO APPROVE AND COMPLY WITH THE PERSONNEL PLAN

Judges hold a unique position in the court employment structure. They are simultaneously employers and employees, and yet, as elected officials, they are accountable in many ways only to the public. However, for the court to operate effectively and fairly, the judges in any particular court must be working together with their administrators and employees. The judges must support the personnel plan and comply with it for the plan to operate effectively and fairly. Recommendation 3 proposes an amendment to California Rules of Court, rule 206, requiring judges to comply with the court's personnel plan.¹¹⁵

FINDINGS

While it may seem unnecessary to require by rule that judges comply with the court's personnel plan, the committee found that judges often failed to comply with court personnel plans, both as employers and as members of the court community. The rule change will provide a potential basis for discipline if willful failure to comply continues.

Further, for some employees, such as the executive officer or, occasionally, court reporters, the judges themselves are the direct employers—recruiting, interviewing, hiring, evaluating performance, assigning tasks, supervising, promoting, and firing. These employees should have the benefits and safeguards afforded other employees of the court to the extent appropriate to a "confidential" position. The personnel plan could make explicit the differences affecting such positions but still protect such employees from unlawful discrimination.

RECOMMENDATION 3

Request the Judicial Council to approve in principle and instruct staff and the appropriate committee to draft amendments to California Rules of Court, rules 206 and 534, to require that each judge in superior and municipal courts shall comply with the courts' personnel plans.

DISCUSSION AND ANALYSIS

Ideally, the court personnel plan should be the result of a collaborative process among the judges, the court executive, and representatives of court employees. The personnel plan will not be imposed on the judges; rather, the judges must approve of the personnel plan as a group for it to be adopted in the first place. Thus, the rule change will simply underscore and ensure the judges' individual commitments to adhere to the

¹¹⁵ See Cal. Rules of Court, rule 206(5) (added July 1, 1991) and rule 532.7 (adopted July 1, 1991).

plan that they approve.

It is clear that judges need to know more about their obligations as employers. Anonymous questionnaire responses at the Developing Management Skills conference in July 1988 referred to judges who asked illegal questions at interviews or told women outright that they planned to hire men for certain jobs. One respondent said that the judge told her he only interviewed her by mistake because her name was Michael. Lederman noted that some judges continue to think that their employees serve at their unfettered discretion, and she warned that the judges need to be educated about potential liability for discrimination and sexual harassment.¹¹⁶ The personnel plans should contain sections on training for judges as well as for other employees. Judges may wish to be oriented to the personnel plan as part of their training.

Requiring judicial compliance with the plan will also improve employee relations. If a judge refuses to comply with a court's personnel plan in regard to, for instance, leaves for courtroom employees, the executive officer may be in a difficult position absent a rule requiring judicial compliance. Recommendation 3 would provide more than moral suasion to ensure the fair and orderly administration of the court.

Requiring compliance with the personnel plans will also underscore the importance of formal training of judges on court administration matters. Testimony by Judge H. Ronald Domnitz, the immediate past presiding judge of the San Diego Municipal Court, described the overall responsibility of the presiding judge for the management of court personnel and the need to ensure that promotions are based on merit.¹¹⁷ By requiring compliance with a personnel plan, judges are put on notice of affirmative action goals, sexual harassment policies, and other benefit policies of the court from which they cannot individually deviate by whim or fiat.

While it would be comforting to believe that there need not be a rule requiring judges to comply with court personnel plans, the rule is necessary. Some judges believe that the terms and conditions of employment of those who work in their courtrooms are solely within their discretion. More frequently, judges do not have the time to familiarize themselves with the personnel plans, and they make mistakes because of lack of knowledge. Requiring judges' compliance through a court rule will provide an incentive for judges to avoid mistakes that create increased risks of liability for the court.

¹¹⁶ Sacramento public hearing transcript, pp. 49–50. See also *Fitch v. Commission on Judicial Performance* (1995) 9 Cal.4th 552, confirming the censure of a judge for sexual harassment of female court reporters and clerks.

¹¹⁷ San Diego public hearing transcript, p. 21.

4. ADMINISTRATIVE OFFICE OF THE COURTS AS A RESOURCE AND CLEARINGHOUSE FOR COURT PERSONNEL PLANS

The AOC in recent years has expanded the services it can offer directly to trial and appellate courts. With the cooperation of courts around the state, and some additional staff, the AOC can operate as the hub of an information exchange on personnel practices. By collecting and disseminating information on a variety of court employment practices, the AOC will speed the evolution of court administration in this important area.

FINDINGS

The committee found that employment practices varied dramatically from court to court in California, and that many courts simply had no experience with certain types of procedures or benefit programs. Rather than have each court administrator create a personnel plan from scratch, this recommendation will allow each court to gain the benefit of the experience in other courts. During the interviews conducted on site at six courts around the state, court administrators indicated their desire for the AOC to act as a resource in this way.

RECOMMENDATION 4

Request the Judicial Council to seek additional AOC staff:

- (a) To assist the courts in developing the court personnel plans required by the amended rules;**
- (b) To develop reporting forms and to collect and analyze the data on personnel policies, plans, and practices required annually by the amended rules in order to identify desirable personnel practices and minimum standards for courts that would aid in the elimination of gender bias; and**
- (c) To act as a resource for courts by developing alternative personnel plans, compiling "case studies" from courts reflecting successful implementation of, for example, flex-time or gender bias training, and providing videotape or other training on subjects such as gender bias and sexual harassment.**

DISCUSSION AND ANALYSIS

Recommendation 4 will enable the AOC to facilitate the use of preferred personnel practices by all California courts in three ways. First, a staff person at the AOC can work directly with courts on the required personnel plans.

Second, Recommendation 4 works in conjunction with Recommendation 1(c), which asks the Judicial Council to amend certain court rules to require a report to the AOC on personnel plans so that the AOC can act as an information clearinghouse on different kinds of plans and the effectiveness of each in eliminating gender bias. Recommendation 4 calls for AOC staff to develop a reporting form and to take responsibility for collection and analysis of the data gathered. The information gained would be accessible to all courts in developing and updating their personnel plans.

Third, Recommendation 4 requires the AOC to develop alternative personnel plans, perhaps for different sizes of courts, and to develop training and training materials on gender bias and other subjects for court use. As noted previously, some small courts have asked the AOC to take an expanded training role.

The thrust of the proposal is to use the AOC as a clearinghouse and resource for all courts in the area of employment practices. By so doing, every court can easily have access to information on modern personnel practices that diminish the effect of gender bias on the court workplace.

5. NEED FOR TRAINING OF ALL COURTROOM ATTACHÉS

Not all of the people working in a courthouse are employed by the judges or executive officer implementing the personnel plan. Nevertheless, these other workers can be a source of incidents of gender bias or sexual harassment. While the court cannot control these workers directly, the court can take responsibility for ensuring that they are offered training on gender fairness and sexual harassment and, in that way, make the court's expectations on appropriate workplace behavior very clear.

FINDINGS

During the course of the public hearings and in many written submissions, the committee found that female attorneys, employees, and court users often complained about the gender-biased treatment they received from court attachés who were not employed directly by the judge or court executive officer.¹¹⁸ Bailiffs, county clerk employees, and probation officers were some of the court attachés mentioned.

¹¹⁸ Materials on file at the AOC.

RECOMMENDATION 5

Request the Judicial Council to approve in principle and instruct staff and the appropriate committee to draft amendments to California Rules of Court, rule 205 and rule 532.5, to provide that the presiding judge shall evaluate the policies and training programs concerning gender fairness and sexual harassment available for county clerk employees, bailiffs, probation officers, and other regular courtroom participants and may recommend that these individuals attend training programs on gender fairness and sexual harassment offered by the courts or other agencies.

DISCUSSION AND ANALYSIS

During the course of the committee's investigation, many witnesses referred to problems with courtroom personnel not under the jurisdiction of the court executive. For example, those attending the Association of Municipal Court Clerks convention in October 1988 brought up the issue of sexual harassment by these noncourt employees, as did those attending the Developing Management Skills conference in July 1988.¹¹⁹ Jill Schlichtman, chair of the Gender Bias Committee of the Queen's Bench organization, recounted an instance of a bailiff forcibly kissing a public defender after leading her to the lockup room; the incident led to the revelation that he had done this to a number of attorneys. The punishment that the bailiff received for this conduct was considered inappropriately mild by Schlichtman.¹²⁰ Mild punishment may be one result of the attenuated reporting system—a court employee complains to the court administrator, who calls the sheriff, who may or may not take the problem up with a bailiff.

The lack of control over certain courtroom participants is caused by the split in employing authority. In narrative responses to question 11 on the Judges' Survey, several judges commented on the need to speak privately with bailiffs about conduct, with the added threat of going to the bailiff's supervisor.¹²¹ Alan Carlson, then executive officer of the Monterey Superior Court, stated that he thought there should be a sexual harassment training program that included bailiffs so that the judge retains control over

¹¹⁹ See Report on Management Skills Workshop, *supra*, p. 2; Report on Municipal Court Clerks Conference, *supra*, p. 5.

¹²⁰ San Francisco public hearing transcript, pp. 38–40.

¹²¹ Judges' Survey, question 11.

what is occurring in the courtroom.¹²² Although the presiding judge does not have any direct line authority over these employees, he or she could work with the actual employer to make available the training offered to court employees on gender bias and sexual harassment. Including bailiffs and other employees in training would give the court more control over the behavior of courtroom personnel by clarifying the expectation regarding appropriate behavior.

Recommendation 5 would require the presiding judge to evaluate the training given to court employees not necessarily employed by the judges or court executive officer, so that an informed decision can be made about the need to invite these employees to join in court-sponsored training on gender fairness and sexual harassment. It is appropriate for this responsibility to fall, at least initially, on the presiding judge so that any request to join the training has the imprimatur of the court.

B. JUDICIAL LEAVE POLICY

The face of the bench in California is changing. Every year, more lawyers in the 30–40 age bracket are being appointed to the bench. Many of these young men and women are or are going to be the mothers and fathers of young children. Simultaneously, they may be faced with the care of aging parents. In recognition of this reality, in February 1989 the American Bar Association urged states to adopt minimum leave standards proposed by the National Conference of Special Court Judges, so that each judge would not be required to struggle individually with the problems posed by taking time with family responsibilities.¹²³ The California Judges Association Executive Board urged the Judicial Council to adopt three categories of family leave for judges: maternity leave, parental leave, and family compassionate leave. In this request the California Judges Association specifically asked that "any policy adopted should not deter women of child-bearing age or their spouses from serving in the judiciary, and should promote the importance and integrity of the family unit."¹²⁴

FINDINGS

The committee found that while judges have the same needs for pregnancy, parental, and family compassionate leaves as other employees, their needs must be dealt with separately because of their unique position. Currently, there is no clear policy about the amount of leave a judge can take. With court backlogs growing around the state, the pressure on judges to take little or no leave is tremendous. Yet those same work pressures underscore the human need to take the time to be with a new or ill family

¹²² Summaries of Court Interviews, *supra*, p. 5.

¹²³ See ABA 1989 Midyear Meeting Report (1989) 28 Judges' Journal 1. The National Association of Women Judges also encourages the adoption of a paid parental-leave policy in every jurisdiction.

¹²⁴ Dove, *Judicial Leave on National and State Agendas* (1989) 89 Court Commentary 3.

member. As the number of judges in the child-bearing years increases, the need for such a policy becomes more pressing. The California Judges Association noted, and the committee agreed, that an unduly limited leave policy, or the lack of any leave policy, can deter women of child-bearing age or their spouses from serving in the judiciary.

RECOMMENDATION 6

Request the Judicial Council to approve in principle and instruct staff and the appropriate committee to draft amendments to California Rules of Court, rule 205 and rule 532.5, to establish a comprehensive leave policy for judges, including appropriate pregnancy-related leave and parental leave policies, sick leave, disability leave, and family compassionate leave.

DISCUSSION AND ANALYSIS

A parental leave standard is no longer as controversial as it once was, and many national organizations are calling for the adoption of parental leave standards. The National Conference of Special Court Judges has developed judicial leave standards, including standards for parental leaves.¹²⁵ The National Association of Women Judges (NAWJ) has also passed a resolution in support of a paid parental leave policy.¹²⁶ The policy extends the definition of a parental leave to include care for a seriously ill family member and calls for a minimum of 60 working days' paid leave, with additional leave allowed at the discretion of the judicial administrative authority for unusual circumstances.

The NAWJ resolution notes that a parental leave policy would also protect judges from criticism from the public. At Stanislaus Municipal Court, there is a three-month parental leave for both sexes, yet the only user thus far, a male judge, took only one week, perhaps out of fear of criticism.¹²⁷ By establishing a parental leave standard, the Judicial Council would foster a judicial climate in which male as well as female judges are really free to take the time to bond with their children.

A comprehensive policy, as recommended by the committee, will also guard against arbitrary denials of leaves or any appearance of unfairness to the other judges on the bench. One judge testified that standards for judicial parental leave, for both newborns and newly adopted children, would have made her job, and the job of her

¹²⁵ See ABA 1989 Midyear Meeting Report, *supra*, p. 1.

¹²⁶ See letter and attachment from the National Association of Women Judges, received Feb. 14, 1989, on file at the AOC.

¹²⁷ Materials on file at the AOC.

presiding judge, easier. Because of a series of miscarriages, a birth, and an adoption, she asked for a number of leaves in her eight years on the bench. This judge claimed she encountered resentment from her colleagues on the bench when she took leaves.¹²⁸ A leave policy might have clarified her rights and responsibilities, allowing all to get on with the business of the court in a collegial atmosphere.

Recommendation 6 requests the Judicial Council to amend the California Rules of Court to establish a comprehensive judicial leave policy. While this report focuses on issues affecting the family life of a judge, the council may wish to address other leave issues in one rule.

C. CHILD CARE FOR COURT EMPLOYEES AND COURT PARTICIPANTS

FINDINGS

Parents working in the court and parents coming to court as witnesses, jurors, and litigants all need affordable, accessible child care. Ignoring this need has led to loss of employees, absent witnesses, and delinquent jurors. It has also resulted in children disrupting court proceedings and experiencing inappropriate courtroom testimony. It is common knowledge that as the family patterns and mobility of the American population have changed, many children no longer have the safe, free option of staying with relatives.¹²⁹ By working with county administration, courts could provide both regular and drop-in day care for children of employees and court participants for a reasonable fee.

1. CHILD CARE FOR COURT EMPLOYEES

RECOMMENDATION 7

Request the Judicial Council to add to the charge of its Facilities Advisory Committee the need to develop ways for counties and courts to work together to ameliorate the important problem of creating quality and affordable child care for all court employees and judicial officers near where they work.

¹²⁸ Fresno public hearing transcript, pp. 75–87.

¹²⁹ *Employees and Childcare: Benefiting Work and Family*, U.S. Dept. of Labor, Office of the Secretary, Women's Bureau (1989), p. 3.

DISCUSSION AND ANALYSIS

As previously noted in the section on the need for employee benefits facilitating child care, the committee found that the career mobility of many employees, particularly women, is adversely affected by the problems of combining child rearing and work outside the home. Often, the courts, like private employers, lose experienced employees because the employees lack safe, affordable child care. The employee who continues to work may be distracted by concerns about quality, affordable child care and the conflict between the demands of work and the demands of care for their children.¹³⁰

In the private sector, many employers offer on-site or close-by child care to their employees.¹³¹ Other states' gender bias task forces, noting the studies showing women as primary caretakers, recommend that trial courts provide day care facilities and institute job sharing and flexible working hours.¹³² For example, the Maryland recommendations call for on-site child care or subsidized off-site child care.¹³³

The data garnered by the committee revealed that child care-issues were omnipresent in the concerns of female court employees. The participants at the discussion groups at both the Developing Management Skills conference and the Association of Municipal Court Clerks meeting in 1988 all agreed that the issue of child-care is critical because the lower-paid staff cannot afford the child care that is now available. These participants specifically called for fringe benefits relating to child care.¹³⁴ This constant worry about child care has an adverse impact on staff productivity and morale.

Job performance appears to be closely linked to employee comfort with child-care arrangements. The respondents to the questionnaire at the Association of Municipal Court Clerks meeting were asked if affordable child-care facilities were available and, if not, whether having such facilities would improve the job performance of employees who are parents. Only one respondent said that there was affordable child care, but 22 believed that having such care would probably improve job performance. This was the view not only of employees but also of a former judge, who, testifying at the Fresno

¹³⁰ U.S. Dept. of Labor, *supra*, p. 7.

¹³¹ Materials on file at the AOC. See, e.g., *On-Site Day Care: Not Just Fun and Games* (May 15, 1989) Legal Times 52.

¹³² See, e.g., Massachusetts Gender Bias Study, *supra*, pp. 193–95.

¹³³ Maryland Gender Bias Report, *supra*, p. 95.

¹³⁴ See Report on Management Skills Workshop, *supra*, p. 3; Report on Municipal Court Clerks Conference, *supra*, p. 3.

regional meeting, said that the issue of child care for employees was even more crucial than child care for litigants.¹³⁵

Both testimony and the in-depth interviews with six courts revealed that courts are working to try to accommodate the employees' needs for affordable, quality child care.¹³⁶ The possibility of establishing child-care centers for employees is being explored both in Los Angeles Municipal Court and in Alameda County. As Virginia Piper stated: "Child care is a problem in the workforce, to have adequate childcare, and affordable childcare for employees. We don't have it."¹³⁷ In Santa Cruz, the union seems to be taking the lead on this issue. In every court, however, the need has been recognized.¹³⁸

Recommendation 7 requests that the Judicial Council ask the Facilities Advisory Committee to develop ways for counties and courts to work together to ameliorate the problem of lack of affordable quality child-care for court employees. Ventura County courts worked with the county to provide sick-child care for employees' children at the county hospital. There is a child-care facility in the Los Angeles County Civic Center available to both court and county workers. With these examples as limited models, programs addressing the child-care needs of both county and court employees can be created elsewhere. The committee concluded that, working with county administrations, courts can and should help employees find an acceptable child-care situation. Courts will benefit from the resulting peace of mind experienced by their employees.

2. CHILD CARE FOR COURT PARTICIPANTS

Since 1987, Standards of Judicial Administration section 1.3 has recommended that each court endeavor to provide a children's waiting room located in the courthouse for the use of minors under the age of 16 who are present on court premises as participants, or who accompany persons who are participants in court proceedings. Based on the continued problems experienced in courts without such facilities, it is time to consider making such facilities in new and remodeled court buildings mandatory. Indeed, the Legislature has expressed its view on the subject through Penal Code section 868.6(b), which states the following:

Each county is encouraged to provide a room, located within a reasonable distance from the courthouse, for the use of minors under

¹³⁵ See Fresno regional meeting summary, p. 2.

¹³⁶ Summaries of Court Interviews, *supra*, pp. 3, 6, 8–9, 11, 13.

¹³⁷ Los Angeles public hearing transcript, p. 67.

¹³⁸ The judges of the San Francisco superior and municipal courts have agreed to set aside space in a proposed new civil courthouse to accommodate both employee child care and a children's waiting room. The private bar, led by the San Francisco Women Lawyers Alliance, has agreed to raise funds for the first year of operation. The new courthouse is expected to be completed in 1997.

the age of 16. Should any such room reach full occupancy, preference should be given to minors under the age of 16 whose appearance has been subpoenaed by the court. The room may be multipurpose in character. The county may seek the assistance of civic groups in the furnishing of the room and the provision of volunteers to aid its operation and maintenance. If a county newly constructs, substantially remodels or refurbishes any courthouse or facility used as a courthouse on or after January 1, 1988, that courthouse or facility shall contain the room described in this subdivision.

Recommendation 8, below, further recognizes the need for children's waiting rooms.

RECOMMENDATION 8

Request the Judicial Council to recommend to its Facilities Advisory Committee that waiting rooms for children of court participants be made a priority issue.

DISCUSSION AND ANALYSIS

Just as employees in the courts have difficulty finding affordable quality child care, litigants, witnesses, jurors, and defendants may also find themselves without a dependable and affordable caretaker during court appearances. Since women are still the primary caretakers in our society, this lack of child care limits a woman's access to court: it is a type of institutionalized gender bias. For example, if a woman normally takes care of her own preschool children, finding a babysitter during the day is not an easy task; relatives may be far away, friends at work, and teenagers in school. Commercial babysitting services offer strangers to care for a woman's children, at high rates of pay. The committee found that a battered woman who must come to court for a restraining order may find herself in the most need, for she may have little advance warning of her need for child care, and no independent means to pay for such care.

Dr. Susan McCain, co-principal in the Pro Se Litigant Project, conducted a study at the Department of Sociology at UCLA about the problems of a woman coming to court by herself, particularly a battered woman.

What we have here is a case where a woman who is already fearful of physical harm, she's already anxious, she comes in and she has to face a pile of forms which I think would be difficult for most anyone to do, and she's got to attend to a child at the same time. I've observed court personnel helping out women who had to bring their children into the courtroom with them so that they'd have an

opportunity to fill out these forms, but I've also seen children wait in the hallway.¹³⁹

Indigent criminal defendants, at risk of losing their children all too soon anyway, are put in impossible situations by the lack of child care in the court building.¹⁴⁰ At the San Francisco regional meetings, two public defenders testified that child care is needed in the courthouse for indigent female defendants because male judges think the defendants bring their children to appeal to sympathy in sentencing.¹⁴¹ At the Fresno regional meeting, a legal services attorney testified that one judge told a woman defendant that she would be held in contempt if she did not remove her children from the courtroom, and that if she did not return, the judge would issue a warrant for her arrest. When she returned, the judge told her what a bad mother she was, and, in the attorney's opinion, probably sentenced her more severely than she otherwise deserved.¹⁴² At the Orange County regional meeting, a family law civil litigator testified that there is a need for a children's waiting room for both sentencing hearings and other proceedings.¹⁴³

Written comments have come in from around California on this issue. From Butte County, a woman wrote that children must wait for hours at courts. The tense situation and lack of diversion cause short tempers; the children are frequently hit and consequently cry. She also noted the hardships that continuances and standby witness subpoenas cause to women caring for children; they must continually employ babysitters that may be unnecessary. Recently, she wrote, a juror was chastised by the court for bringing her children to jury duty.¹⁴⁴ From Alameda County, a woman wrote that child-care problems account for many of the no-shows in juvenile court and elsewhere.¹⁴⁵ From Los Angeles, a woman wrote that witnesses and litigants often bring children to court; they have no other choice. She wondered what effect having her children in court

¹³⁹ Sacramento public hearing transcript, p. 96.

¹⁴⁰ In February 1991, the San Francisco Women Lawyers Alliance, working together with the Northern California Service League, opened a children's waiting room in the Hall of Justice, San Francisco's criminal courthouse. At the time it opened, this room was the only children's waiting room to be entirely funded by private donations. Today, the room is still the only children's waiting room in a Bay Area courthouse. Administered by the Northern California Service League, it serves approximately 140 children each month, predominantly from low- to moderate-income backgrounds. Modeled on "La Casita," the waiting room developed by Sacramento Municipal Court Judge Alice Lytle, the San Francisco Children's Room is now funded by two government funding sources: the Mayor's Office of Community Development (administering Federal Housing and Urban Development grants), and the Mayor's Office of Children, Youth and their Families (administering funds available through San Francisco's Children's Amendment). The approximately \$35,000 annual budget for the room covers salary and fringe benefits for a full-time coordinator, as well as the cost of a part-time assistant and insurance coverage. All furniture and most supplies have been donated by local companies and individuals.

¹⁴¹ San Francisco regional meeting summary, p. 1.

¹⁴² Fresno regional meeting summary, p. 1.

¹⁴³ Orange County regional meeting summary, p. 24.

¹⁴⁴ Summary of regional meeting written materials, p. 34.

¹⁴⁵ Material on file at the AOC.

had on a female litigant and on the judge hearing her case.¹⁴⁶ Judge Linda Miller of North Orange County Municipal Court has expressed her views on this subject: "I've had to send children of witnesses out into the hallway because they were making so much noise. It's not safe for the kids because we don't have anyone to watch them. And it's not fair to the parent because he or she can't concentrate on testifying because they're worried about their children."¹⁴⁷

While the lack of child care in courthouses has a disparate impact on women because they are the primary caretakers, men would benefit from child care in courthouses as well. A male attorney in San Francisco reported to the committee staff that, because of a sudden emergency, he had to have his six-year-old son seated in the courtroom all day while the attorney conducted cross-examination.¹⁴⁸ Child-care facilities in the courthouse could have not only helped father and son but also eliminated distractions for the judge and jury.

Around the country, there is a movement to provide child-care facilities in courthouses. The Massachusetts Gender Bias Study noted that child-care facilities are available in some courts and recommended them for all courts.¹⁴⁹ The Maryland Special Joint Committee recommended establishing on-site child care for litigants, jurors, and witnesses.¹⁵⁰ The New York report emphasized that the dearth of space for children whom mothers must bring to court effectively precludes many women from appearing in court.¹⁵¹

Since 1987, Standards of Judicial Administration section 1.3 has suggested that each court should endeavor to provide children's waiting rooms. The Facilities Advisory Committee may wish to suggest to the council that, by newly adopted rule, new and remodeled facilities must include children's waiting rooms.¹⁵²

At this point in our cultural history, child-care issues still have the heaviest impact on women, who are usually the primary caretakers. Thus, when women with children have to go to court, to work or to participate as witnesses, jurors, litigants, or defendants, these women are often asked to make impossible choices. The inevitable result is limited access to the courts for many female court participants and for many female

¹⁴⁶ Material on file at the AOC.

¹⁴⁷ *The Case for Childcare at the Courthouse* (Jan. 25, 1987) Los Angeles Times, pt. 4, p. 4.

¹⁴⁸ Material on file at the AOC.

¹⁴⁹ Massachusetts Gender Bias Study, *supra*, p. 168.

¹⁵⁰ Maryland Gender Bias Report, *supra*, p. 128.

¹⁵¹ New York Gender Bias Report, *supra*, p. 202.

¹⁵² The Judicial Council Advisory Committee on Court Facilities has in fact issued a report containing a standard that mandates children's waiting rooms. See Judicial Council of Cal., Cal. Facilities Standards (Trial Court) (1991), p. 47. Standard V.5 provides that "[a]ll courthouses should maintain, during court hours, a supervised facility or 'children's waiting room,' as mandated by Pen. Code, § 868.6. . . , where children may remain while parents conduct court business."

employees unable to advance in their jobs because of distracting child care problems. By providing on-site or nearby child care, the courts will significantly diminish these problems.

D. EMPLOYMENT PRACTICES AND GENDER-BIASED TEACHING IN LAW SCHOOLS

Judges, lawyers, and a number of court administrators in California begin their careers in law school. As men and women train in law schools and schools for legal technicians, they are shaped by the role models offered to them and by the thinking reflected in the course offerings and instruction they receive. Unfortunately, a number of studies have indicated that law schools are afflicted with gender bias in both employment practices and teaching methods. For example, a study conducted by Georgetown University Law Center Professor Richard H. Chused for the Society of American Law Teachers shows that relatively few prestigious law schools are retaining tenured female faculty. At the same time, two-thirds of the nontenured, lower-paid legal writing instructor positions are occupied by women.¹⁵³ Changes in employment practices and in teaching methods could balance the viewpoints offered to impressionable law students.

FINDINGS

The advisory committee found that gender bias is evident in the employment practices, the curricula, and teaching methods of many California law schools. As discussed below, female professors have been denied tenure under circumstances that bespeak gender bias. Casebooks continue to use stereotypical females, teachers continue to discount female experience, and gender bias itself continues to be ignored as a subject to be studied for its impact on substantive law and trial practice.

RECOMMENDATION 9

Due to the primary importance of educating all members of the profession on the nature and effects of gender bias in the legal system, request the Judicial Council to transmit to and urge consideration by the deans of law schools and schools training legal technicians the Advisory Committee's recommendation that the schools develop written policies and other programs that will:

¹⁵³ Chused, *The Hiring and Retention of Minorities and Women on American Law School Faculties* (1988) 137 U. Penn.L.Rev. 537, 538–39. The study compiled responses from 149 law schools during the 1986–87 academic year.

- (a) Eliminate gender bias from classroom interactions, casebooks, and course materials;
- (b) Eliminate gender bias and encourage diversity in the hiring, promotion, and tenure of faculty;
- (c) Include gender and other fairness as an integral part of all professional responsibility courses;
- (d) Include an analysis of the way in which gender bias can taint expert testimony, cross-examination, interpersonal conduct between attorneys and between attorneys and judges, jury selection, and juror use;
- (e) Provide grievance procedures and discipline for sexual harassment by students, faculty, or employees; and
- (f) Eliminate gender bias in on-campus recruiting.

Further, request the Judicial Council to transmit to and urge consideration by the State Bar and the Committee of Bar Examiners the Advisory Committee's recommendations to the law schools, as appropriate, and further urge that representatives of the State Bar and the Committee of Bar Examiners meet with the law school deans on these subjects.

DISCUSSION AND ANALYSIS

- **Employment Practices**

Although according to American Bar Association (ABA) statistics, women have consistently taken roughly 40 percent of the places in law schools in recent years, female law school graduates have not been moving into tenured professorships.¹⁵⁴ For instance, Stanford Law School had only 2 women among its 36 tenured professors when the Chused study was conducted; at the University of Southern California Law Center, 3 out of 31 tenure or tenure-track positions were held by women. The Chused study also showed that women seeking tenure at "high-prestige" law schools are denied tenure at a significantly higher rate than their male counterparts.¹⁵⁵ A 1989 article in the *Los*

¹⁵⁴ *Law Schools Lag on Tenure for Women* (Jan. 27, 1989) San Francisco Banner-Daily Journal 3.

¹⁵⁵ Chused, *supra*, pp. 550–52.

Angeles Daily Journal quoted Barbara Babcock, former assistant attorney general in the United States Justice Department and currently a professor at Stanford: "So we're in a profession of trying to teach what the law can do to create a moral environment—and yet students are in an institution that on the face, discriminates against women. I really do view it—and increasingly more so over the years—as an urgent problem."¹⁵⁶

Former member of the State Bar Board of Governors Patricia Phillips, testifying at the Los Angeles public hearing, recounted the poor showing of women on law school faculties: "Coming to terms with the possibility of gender bias in the law schools is a step in the right direction toward elimination of gender bias in the court and in the practice of law. Hiring more female faculty is a step in the right direction."¹⁵⁷

Boalt Hall School of Law, at the University of California at Berkeley, underwent notorious and prolonged battles over tenure before granting it to two women candidates. When Eleanor Swift filed her sex discrimination claim against Boalt, no woman had received tenure for 17 years. Swift claimed she had been held to more exacting standards than her male counterparts when she was denied tenure. An outside tenure review committee ultimately reversed the decision of the Boalt committee, and she gained tenure. Meanwhile, a faculty committee on privilege and tenure found that Boalt faculty failed to apply fair and equitable standards when considering tenure for female professors. Following this finding, Marjorie Shultz, who had previously been denied tenure twice, was granted tenure.¹⁵⁸ Among the articles Shultz had written were a number from a feminist perspective. A colleague at Boalt, then Professor (now Dean) Herma Hill Kay, has noted that an underlying problem in the struggle over tenuring female faculty is a disintegration of the traditional consensus about what constitutes excellence in legal scholarship.¹⁵⁹

Betsy Levin, a former executive director of the Association of American Law Schools (AALS) and former dean of the University of Colorado School of Law, told an ABA commission that "promising scholars were being chilled from undertaking scholarship in gender-related legal issues, because such work is not taken seriously by the male faculty who are making tenure and promotion decisions."¹⁶⁰

¹⁵⁶ *Women Face Bar to Tenure at Law Schools* (Jan. 25, 1989) *Los Angeles Daily Journal* 2.

¹⁵⁷ Los Angeles public hearing transcript, p. 49.

¹⁵⁸ See series of articles in *The Recorder*: Oct. 11, 1988; Dec. 14, 1988; Aug. 28, 1989.

¹⁵⁹ San Francisco public hearing transcript, p. 61. Prof. Herma Hill Kay, now dean of Boalt Hall, was at the time of her testimony president of the Association of American Law Schools (AALS). In her testimony at the San Francisco public hearing, she said that one of her top goals was to improve the number of tenured women at ABA-accredited schools. To this end, she appointed a special committee to study tenure and the need to retain qualified women professors. According to Dean Kay, tenure issues have arisen partly because feminist jurisprudence was not well evaluated by traditionalists in the law schools. *Id.*, pp. 59–61.

¹⁶⁰ Betsy Levin's quotation is contained in material provided by Dean Kay, on file at the AOC. What is taught in law schools is often directly related to who is doing the teaching. Many of the women teaching in law schools

Hastings College of the Law in San Francisco received media attention when it became embroiled in a dispute over selective denial of maternity leave. Hastings apparently urged Professor D. Kelly Weisberg to take her maternity leave before her baby was born, rather than after.¹⁶¹ Since Hastings had no formal maternity leave policy, there was no clear guidance as to whether the mother's needs or the institution's needs could dictate the time of the leave.

• Law School Curricula and Teaching Methods

A number of scholars have suggested methods to analyze course content for sex bias and eliminate it. In two separate articles presented as part of a symposium on women in legal education, Professors Nancy Erickson and Mary Irene Combs analyzed sexism in criminal law teaching and casebooks.¹⁶² Carl Tobias studied gender issues in the Prosser, Wade, and Schwartz *Torts* casebook.¹⁶³ Professor Mary Jo Frug dissected a well-known contracts casebook for gender bias.¹⁶⁴

The committee's research did not reveal literature on the effects of gender bias in clinical trial practice courses. Yet, individual committee members recalled learning how to play to sexual stereotypes in cross-examination, use of expert witnesses, and jury selection. Clinical courses need to be examined for the inherent gender bias reflected in these techniques.

Gender fairness itself might well be considered a subject for study in legal ethics courses. As this concept enters into codes of professional responsibility and judicial conduct, students need to study it in order to take it seriously enough to make it a part of their daily lives as practitioners.

Teaching methods, as well as curricula, can reflect gender bias. The *Stanford Law Review* published a study in 1988 of law students and graduates from Stanford indicating that female students participate far less in class than their male peers. The study posited that "lower rates of class participation may reflect women's withdrawal from certain

today study and write about a feminist view of substantive and procedural law. See *Women Face Hurdles as Professors* (Oct. 24, 1988) *National Law Journal*. By keeping feminist scholars out of law schools, their ideas never touch the next generation of lawyers, judges, and court administrators.

¹⁶¹ San Francisco *Banner-Daily Journal* (Apr. 13, 1989), pp. 1–2.

¹⁶² Erickson, *Sex Bias in Law School Courses: Some Common Issues*; and Combs, *Crime in the Stacks, or a Tale of a Text: A Feminist Response to a Criminal Law Textbook*, in Symposium, *Women in Legal Education—Pedagogy, Law, Theory and Practice* (1988) 38 *J. Legal Education* 101, 117 [hereinafter "Women's Legal Education Symposium"].

¹⁶³ Tobias, *Gender Issues and the Prosser, Wade, and Schwartz Torts Casebook* (1988) 18 *Golden Gate L.Rev.* 495.

¹⁶⁴ Frug, *Re-Reading Contracts: A Feminist Analysis of a Contracts Casebook* (1985) 34 *Am.U.L.Rev.* 1065.

dimensions of the law school experience,"¹⁶⁵ including the Socratic method, which denigrates the high value many women place on personal feelings and beliefs, as opposed to conflict and competition.¹⁶⁶ Indeed, 44 percent of male graduates favored professors adept at Socratic dialogue, while only 29 percent of females graduates did. Women graduates were also found to prefer professors who were accessible and open to questions after class.¹⁶⁷ Among others, Professor Carrie Menkel-Meadow, of UCLA, has written a law review article in part discussing how to revamp the Socratic method.¹⁶⁸ Professor Stephanie Wildman, of the University of San Francisco, has suggested specific techniques for bringing female students into classroom discussions, as has Catharine Hantzis of the USC Law Center.¹⁶⁹

Professor Samuel H. Pillsbury, associate professor at the Loyola University Law School, testified at the Los Angeles public hearing about his efforts to combat gender bias in classroom teaching technique:

In hypotheticals, and in general references to lawyers or judges, I try to use male and female pronouns. I often have women criminal law practitioners come to speak to the class. This usually makes the

¹⁶⁵ Project, *Gender, Legal Education, and the Legal Profession: An Empirical Study of Stanford Law Students and Graduates* (1988) 40 Stan.L.Rev. 1209, 1256 [hereinafter "Stanford Study"]. See also Banks, *Gender Bias in the Classroom*, in Women's Legal Education Symposium, *supra*, pp. 137, 139: women "become silent in class . . . [and] remain silent because they believe that their views carry no weight. They are silent because they believe that women are largely ignored or invisible in law school classrooms."

¹⁶⁶ Stanford Study, *supra*, p. 1220. Other empirical research further supports these criticisms of the Socratic method. See Guinier et. al., *Becoming Gentlemen: Women's Experience at One Ivy League Law School* (1994) 143 U.Penn.L. Rev. 1. The authors studied students enrolled at the University of Pennsylvania Law School from 1987 to 1992 through such methods as academic performance data, self-reported survey data, written narratives, and group-level interview data. The authors' primary empirical finding was that "men outperform women at the University of Pennsylvania Law School." *Id.*, p. 5. The authors specifically found that "many women are alienated by the way the Socratic method is used in large classroom instruction, which is the dominant pedagogy for almost *all* first-year instruction." *Id.*, p. 3. The authors concluded their extremely thorough study with a call for radical change: "...[I]t is not enough just to add women and stir. These data plead instead for a reinvention of law school, and a fundamental change in its teaching practices, institutionalized policies, and social organization." *Id.*, p. 100.

¹⁶⁷ *Id.*, p. 1239.

¹⁶⁸ See Menkel-Meadow, *Feminist Legal Theory, Critical Legal Studies, and Legal Education or The Fem-Crits Go to Law School*, in Women's Legal Education Symposium, *supra*, pp. 61, 77 ("Statistical evidence now confirms what many of us knew experientially to be true, that women tend to speak less in class. The classic Socratic questioner is not only intimidating. If the questioner is male, he is also not as likely to 'hear' female responses; indeed, he may ask different questions of women students." *Id.*, p. 77.)

¹⁶⁹ See Wildman, *The Question of Silence: Techniques to Ensure Full Class Participation*, and Hantzis, Kingsfield, and Kennedy: *Reappraising the Male Models of Law School Teaching*, in Women Legal Education Symposium, *supra*, pp. 147-64.

point about the opportunities for women in the field much more forcefully than anything I could say. . . For our study of date rape, I assign material showing the prevalence of the crime, and the sexual attitudes which make it so common.¹⁷⁰

Celia McGuinness, a law student at Hastings College of Law, testified in San Francisco that:

[G]ender bias does not spring full grown from the brow of the courts. It is fostered in the schools where all lawyers and judges receive their training. . . . I'd like to give you some examples of what we have encountered at Hastings just this school year, and when I recite them, they sound ludicrous and funny, but to experience them is really to be chilled.

After a torts class where first year students were learning to define negligence, a man slapped a woman on the rear end. When she expressed shock and anger, he replied "it was just what any reasonable man would do." . . . [A]nother man brought an inflatable sex doll to class as a joke. Again, when women expressed outrage, they were told they should be less sensitive. In another class, a man stated that students should have sympathy for a defendant who had embezzled his wife's money, after all "he had to marry her and put up with her for the next 20 years."

And probably the saddest commentary on that last example is that the professor, instead of reprimanding the student, fell out laughing. .

. . .
Although there are exceptions, many professors make no attempt to include women in their lectures. The most common evidence is in the language professors use. In hypotheticals, lawyers and judges, and doctors are men. Women are victims or feisty old widows.¹⁷¹

She also noted the lack of gender-neutral language, or, more precisely, the ubiquitous "he" in casebooks and lectures. She explained that the use of "Ms." rather than "Miss" was important in freeing women from identity based on marital status.¹⁷² She recounted women in criminal law classes being called emotional and having their logic discounted. She mentioned a backlash at the school to the large number of women there (51 percent), with intimidation tactics being used against the women and the administration.¹⁷³

¹⁷⁰ Los Angeles public hearing transcript, pp. 71–73.

¹⁷¹ San Francisco public hearing transcript, pp. 120–23.

¹⁷² *Id.*, pp. 123–24.

¹⁷³ *Id.*, pp. 124–30.

McGuinness called on the Judicial Council to let law schools know that gender bias is condemned in the court system and that it is inappropriate and a disservice to students to foster it in legal education.¹⁷⁴ The committee received a letter from McGuinness in October 1989, noting that apparently professors had received an admonition to use gender-inclusive language and hypotheticals in their lectures since her testimony, with the result of some small improvement at the beginning of the term.¹⁷⁵

- **Other Aspects of the Law School Experience**

There is a potential for sexual harassment at law schools, as at many other institutions. The number of female students continues to burgeon, while the number of male professors stays relatively high. The relationship between student and teacher can be very close, yet the student is always vulnerable to the professor's power. For the good of the students, professors, and other law school employees, a sexual harassment policy and grievance procedure are necessities.

The placement office also forms a part of the law school experience. While there is some evidence that women are actually preferred over similarly situated male applicants, across the country women also report recurring instances of illegal inquiries into their family status.¹⁷⁶ The placement office can play an important role in eliminating gender bias from the legal culture.

In conclusion, the committee agrees with the finding of the ABA Commission on Women in the Profession that law schools are the breeding ground for many discriminatory practices and attitudes and for acceptance of traditional notions about women's capabilities and roles. Accordingly, it is incumbent on law schools to try to eliminate gender bias in employment practices, course content, and teaching methods, and indeed to work affirmatively to create an atmosphere of gender equality within the law school setting.

V. CONCLUSION

This chapter's recommendations seek to ensure that courts and law schools do justice to their employees, as well as to litigants and to students. The committee's investigation revealed that women suffer from gender bias in these settings in a number of respects. Although women form the overwhelming majority of employees on court

¹⁷⁴ *Id.*, p. 126.

¹⁷⁵ Letter from Clara Foltz Association against Gender Bias of Hastings College of Law, signed by Celia McGuinness and Alicia Queen, received Oct. 13, 1989; on file at the AOC.

¹⁷⁶ See, e.g., New Jersey First Year Report, *supra*, p. 22; *Women in Law School: It's Time for More Change* (1988) 7 Law and Inequality 135, 140.

staffs, the courts generally do not have personnel plans or court policies on sexual harassment and professional behavior. Nor do most personnel plans enhance a woman's possibility for advancement through training, fair job tracking, reasonable leave allowances, and job scheduling options. The courts have not yet accommodated the children that are part of their employees' lives, or the children that must accompany parents who participate in the courts as litigants and witnesses. Women in law schools also need the protection of guidelines and teaching that eliminate the role of gender bias, both in employment decisions and in classroom dynamics. Without action on these problems, gender bias is not just tolerated, it is exacerbated by institutions no less august than our courts and law schools.

The Judicial Council's constitutional mandate is to improve the administration of justice. Court administration itself must be improved, and must itself be a model of fairness, in order to inspire confidence in the citizenry that justice will indeed be done in the courts.

Chapter Nine

Implementation

I. INTRODUCTION

Full implementation of all the recommendations for change contained in this report is crucial to the successful eradication of gender bias in the California court system. A report gathering dust in the bookcases of judges and lawyers offers little benefit to the citizens of California whose interests it was designed to protect. Instead, this report must be a living document and an ongoing resource for all Californians.

Throughout three years of information gathering and analysis, the advisory committee carefully considered the best possible way to word and ultimately enforce their recommendations for change. Early on, the committee decided to offer recommendations framed as principles or proposals. This was to allow experts in specific areas of the law to hammer out the details of the recommendations, thereby ensuring that they did not inadvertently cause problems for those participants in the justice system they directly affected. Asking experts to flesh out the committee's proposals would also allow for further public comment, with a focus on specific drafts and details. Finally, many of the recommendations *require* the involvement of other agencies and groups, such as the California Judges Association or the State Bar of California. This is especially true in the complex areas of family and juvenile law, where, for example, proposed changes in rules and forms or suggested action by the Statewide Office of Family Court Services must be overseen by other advisory committees or staff.

While the involvement of other agencies and the public is necessary to implement the recommendations in this report, the advisory committee determined that such involvement would not be sufficient. Instead, without continuing monitoring and oversight such as only an implementation committee could provide, this report's recommendations might not receive the priority that they deserve.

As a general matter, the committee viewed education as a crucial element in institutionalizing change. A number of gender bias problems that the committee

discovered stemmed from lack of awareness and education among those who enforce and interpret the law, a failing that can be cured through ongoing educational programs. In that regard, the information contained in this report provides a rich curriculum for educational programs for judges, lawyers and court personnel.

The advisory committee thus concluded that two additional recommendations were imperative. The first concerns the creation of an implementation and monitoring committee, and the second concerns judicial education. An analysis of the need for these two features of implementation follows.

II. THE NEED FOR AN IMPLEMENTATION COMMITTEE

FINDINGS

The advisory committee found that:

1. The proposed recommendations would require input and participation from diverse groups of participants in various areas of the law, including careful drafting, evaluation, and monitoring.
2. An implementation committee is necessary to act as a liaison to other groups charged with the responsibility of carrying out specific recommendations, to draft and solicit comment on those proposals that are not referred to other agencies or committees, and to provide technical assistance and evaluation to all groups engaged in implementation of the committee's recommendations as approved by the Judicial Council.
3. Without an implementation committee, the likelihood of successful implementation of the recommendations is lessened.

RECOMMENDATION 1

Request the Judicial Council to recommend that the Chief Justice appoint an advisory committee for implementation comprised of some members of the Judicial Council Advisory Committee on Gender Bias in the Courts and others, to assist the Judicial Council with the implementation of the recommendations in this report and with evaluating their effectiveness.

DISCUSSION AND ANALYSIS

The former Chief Justice of New Jersey, Chief Justice Robert N. Wilentz, was the first among many Chief Justices to appoint a task force to investigate problems of gender bias in the courts. In 1984, the task force published its full first-year report, and in 1986 it published its second report. New Jersey was again first in its decision to evaluate the work of the task force to determine whether the recommended changes had been fully realized in the New Jersey court system. The result was an in-depth evaluation document: *Learning from the New Jersey Supreme Court Task Force on Women in the Courts: Evaluation, Recommendations and Implications for Other States*, by Dr. Norma Juliet Wikler and Lynn Hecht Schafran. This document emphasized the need to plan early for the difficulties of implementation by developing procedures for monitoring the suggestions for change made by the initial fact-finding body.¹

New Jersey's emphasis on implementation has been emulated in other states that have studied gender bias in their courts. For example, the Washington task force adopted as its flagship recommendation the creation, funding, and staffing of an implementation committee" composed of judicial, legal, and lay persons to monitor, encourage, and evaluate efforts to implement the recommendations of the Gender and Justice Task Force."² Similarly, the Maryland task force urged that "A permanent joint committee of the bench and bar be appointed to encourage, monitor, evaluate, and report on efforts undertaken to carry out the recommendations of this report relating to litigants, witnesses, jurors and lawyers."³ And the Minnesota task force concluded:

This report represents the culmination of two years of effort on the part of the members of the Minnesota Gender Fairness Task Force. But in a very real sense, *it is just the beginning of the Task Force's work*. Ultimately, the value of the Task Force's contribution to the elimination of gender bias from Minnesota's courts, and to fair treatment for all of Minnesota's citizens in those courts, will be measured by future responses to the Task Force report, and especially to the Task Force's recommendations for change.

Recognizing this, the Minnesota Supreme Court has established a standing committee which will continue to exist after the Task Force has

¹ Wikler and Schafran, *Learning from the New Jersey Supreme Court Task Force on Women in the Courts: Evaluation, Recommendations, and Implications for Other States* (1989), pp. vii, 84. Schafran also published a companion report entitled *Planning for Evaluation: Guidelines for Task Forces on Gender Bias in the Courts* (1989) (Women Judges' Fund for Justice).

² Washington State Task Force on Gender and Justice in the Courts, Final Report (1989), p. 9.

³ Maryland Special Joint Committee, Gender Bias in the Courts (May 1989), p. 133.

disbanded, and which has been directed to monitor implementation of the Task Force's recommendations. (Emphasis added.)⁴

In recommending an implementation committee, the advisory committee recognized issuance of the recommendations in this report as "just the beginning" of the work to eradicate gender bias in California's courts. Creation of an implementation committee is essential for the following significant reasons:

1. The committee's inquiry revealed that problems of gender bias are systemic. They require for their solution the collective energies of different branches of government and different justice system agencies.⁵
2. The committee's proposals were not submitted in detail. The recommendations that suggest the adoption of rules, forms, and standards were not accompanied by drafts. Other experts and advisory committees must participate in this process, and public comment must be elicited. A monitoring and liaison committee should be created to oversee these tasks.
3. Many of the proposals are directed to other groups and agencies in the justice system. Technical assistance and follow-up must be provided to ensure that these other agencies seriously consider the recommendations proposed and find the support they need to implement them.⁶
4. Eliminating gender bias in the court system is a long-term process. It will not happen overnight, and refinement and evaluation of the proposed solutions will be necessary.

⁴ Minnesota Supreme Court Task Force for Gender Fairness in the Courts, Final Report (September 1989), p. 110.

⁵ Implementation will not, however, rest exclusively on collaborative work with outside agencies. Unlike, the task forces in other states, which were independent bodies with little power beyond persuasion, the California advisory committee has official stature. Gov. Code, § 68501 permits the Chief Justice to appoint advisory committees that report directly to the Judicial Council, a step he took in appointing the advisory committee on gender bias. To the extent that the advisory committee's recommendations come squarely within the council's power, they can be implemented directly by the council without input from other agencies or governmental bodies.

⁶ For example, the Courtroom Demeanor and Civil Litigation Subcommittee proposed a pilot project that would create local gender bias committees in three counties to handle minor complaints of gender-biased behavior that do not require the intervention of a disciplinary body. An implementation committee could provide the counties involved in the pilot program with technical assistance and suggestions, monitor and report on whether the pilot program is effective, and suggest any necessary modifications to the counties and to the Judicial Council.

III. THE NEED FOR JUDICIAL EDUCATION

FINDINGS

The advisory committee became aware in the course of its research and deliberations that judicial education offering state-specific examples and following new pedagogical approaches was widely perceived as *the most effective and important remedy* for problems of gender bias in the courts.

The committee found:

1. Attorneys and experts who testified at the hearings conducted by the advisory committee universally supported increased judicial education on issues of gender bias.
2. Judges themselves cited judicial education as the most effective remedy for curing problems of gender bias in the courts.
3. To be effective, judicial education on gender bias issues must meet the following criteria:
 - (a) Gender bias education must be integrated into the substantive areas of the law that are already taught, *not* made the only topic of an educational program.
 - (b) Innovative and creative teaching techniques should be developed to counter the resistance shown by some judges to gender bias education.
 - (c) Where appropriate, information from the social sciences must be included so that judges profit from the important research that has been done in the areas of concern and become more knowledgeable about the different life experiences of men and women in our society.
 - (d) In certain specific areas, most notably in family law, the model of voluntary education must yield to required courses for all judges who hear matters in these crucial areas.

RECOMMENDATION 2

- (a) **Request the Judicial Council to approve in principle and instruct staff and the appropriate committee to draft a Standard of Judicial Administration that would provide**

for (1) every new and newly elevated judge or commissioner to attend the California Judicial College within two years of becoming a judicial officer; (2) the inclusion of gender bias issues in the curriculum of both the college and the orientation program for judicial officers and inclusion in the substantive law courses in these to programs of components on gender bias issues relevant to the subject matter;

(b) Request the Judicial Council to urge CJER's Governing Committee to create a special committee to address the significant problem of judicial education in family law. The committee's task would be to develop a program and curriculum in family law designed to ensure that every judicial officer hearing family law matters, including retired judges and those who hear matters only occasionally, would be educated in general on family law issues and more specifically on issues of gender bias arising in family law. CJER's Governing Committee should report back to the Judicial Council within one year with a proposed plan. Upon completion of an appropriate plan which takes into consideration the need for adequate staffing of the courts during a judicial officer's absence for educational purposes, a rule would be proposed which would require each judicial officer who hears family law matters to complete the program;

(c) Request the Director of the Administrative Office of the Courts to select a working group or committee composed of representatives from educational programs for judges, attorneys, court staff, mediators, law students and others involved in the justice system. The task of the committee would be to coordinate efforts to develop quality educational programs on gender bias and other biases, to exchange information, and to provide technical assistance and resources to those engaged in this effort; and

(d) Request CJER to develop a program which would teach CJER's instructors the subtleties and complexities of handling gender bias courses and train them in effective and innovative teaching methods.

DISCUSSION AND ANALYSIS

A. THE NATIONAL PERSPECTIVE

Judicial education on gender bias issues began in 1980 with the formation of the National Judicial Education Program to Promote Equality for Women and Men in the Courts (NJEP), a special joint project of the National Organization for Women Legal Defense and Education Fund and the National Association of Women Judges. NJEP's goal was to transform the desire to be fair, felt and experienced by most judges, into a reality. The project's founding director, Dr. Norma J. Wikler, also served as a specially appointed advisor to California's advisory committee.

In August 1980, Dr. Wikler and a male judge presented NJEP's first gender bias program, a two-hour seminar to the National Judicial College. The program addressed differential sentencing, the economic consequences of divorce, and the effects of gender on the courtroom experience. The program received a generally negative response. As Dr. Wikler has explained, this response

clearly demonstrated that gender bias is a sensitive, even explosive, subject for judges. A special pedagogic approach was needed, and those leading discussions would have to be alert for and adept in dealing with the inevitable denial and occasional intense hostility.⁷

NJEP tried again, this time using a number of consultants over several months to develop a four-hour pilot course, "Judicial Discretion: Does Sex Make A Difference?" Presented to California judges in 1981, the course examined the ways in which sex-based stereotypes affected judicial decision-making in different substantive areas of law and in courtroom interaction. The course relied on statistical data and legal and social science research, and included examples and hypotheticals on issues of rape, the courtroom environment, and family law.⁸ This landmark educational program, which was favorably evaluated, led to the creation of task forces on gender bias throughout the country and the development of judicial education programs nationwide. As Dr. Wikler summarized the subsequent history, "[d]uring the first six years of its existence, the [NJEP gave]. . . courses, talks, workshops, and other presentations in more than 20 states, reaching several thousand judges and nearly as many attorneys."⁹ Together with the state task forces and the National Gender Bias Task Force (created by the National Association of Women Judges), NJEP has continued to provide judicial education programs on gender bias throughout the nation.

⁷ Wikler, "Educating Judges About Gender Bias in the Courts," in Crites et al., *Women, The Courts, and Equality* (1987), pp. 227, 230 [hereinafter "Educating Judges"].

⁸ *Id.*, p. 230.

⁹ *Id.*, p. 232.

B. JUDICIAL EDUCATION ON GENDER BIAS IN CALIFORNIA

As the preceding section makes clear, judicial education on gender bias is by no means new to California. The Center for Judicial Education and Research (CJER), the education division of the Administrative Office of the Courts, has long taken a leadership role in educating judges on this important topic.

CJER was formed in 1973 as a joint enterprise of the Judicial Council and the California Judges Association. A comprehensive summary of CJER's extensive involvement and expertise in the development of judicial education programs on gender and other biases is attached to this chapter as Appendix B. In addition, the advisory committee received testimony on CJER's important role from Judge Robert Weil, then chair of CJER's Governing Committee, Judge Marie Collins, past chair of the committee and a former dean of the Judges College, and CJER's former Executive Director, Mr. Paul Li, at the San Francisco public hearing.

In 1981, CJER presented Dr. Wikler's first successful program on gender bias as part of the first Continuing Judicial Studies Program. Even before that course, as Judge Collins informed the advisory committee, judges were beginning to focus on issues of gender bias in judicial education and were striving to use gender-neutral language and hypotheticals in their presentations.¹⁰ CJER has continued its leadership in education with the development of its fairness programs and with judicial conduct courses taught at the B.E. Witkin Judicial College of California.¹¹

In addition to CJER's ongoing efforts, the Administrative Office of the Courts has developed programs on gender bias issues for court managers and presiding judges, and has consistently included panels and workshops on the subject at its annual court management conference.

C. THE NEW CHALLENGE IN JUDICIAL EDUCATION

1. JUDICIAL EDUCATION AS THE PREFERRED TOOL FOR CORRECTING GENDER BIAS

There has been an increasing recognition of the importance of continuing education in the legal profession. Like more than 35 other professions statutorily required to meet continuing education requirements, California lawyers must complete a minimum number of hours of educational programs.

¹⁰ San Francisco public hearing transcript, p. 90.

¹¹ The work of the original internal committee of the Judicial Council that eventually led to the creation of the advisory committee included a recommendation on judicial education. As a result, in December 1986, the Judicial Council urged CJER to make gender bias a regular part of its curriculum.

Consistent with this trend, the Judicial Council adopted on January 1, 1990, a new Standard of Judicial Administration, which declares: "judicial education for all trial and appellate court judges is essential to enhancing the fair and efficient administration of justice. Judges should consider participation in judicial education activities to be an official judicial duty."¹² This standard also provides guidelines on the amount of time to be spent on judicial education, prescribes the objectives of judicial education, and encourages presiding judges to establish education plans for judges of their courts in order to facilitate the judges' participation as both students and faculty.

In an informal survey conducted by CJER, eight out of fifty-two respondents voluntarily shared their view that the time had come to consider mandatory judicial education. Examples of these comments included:

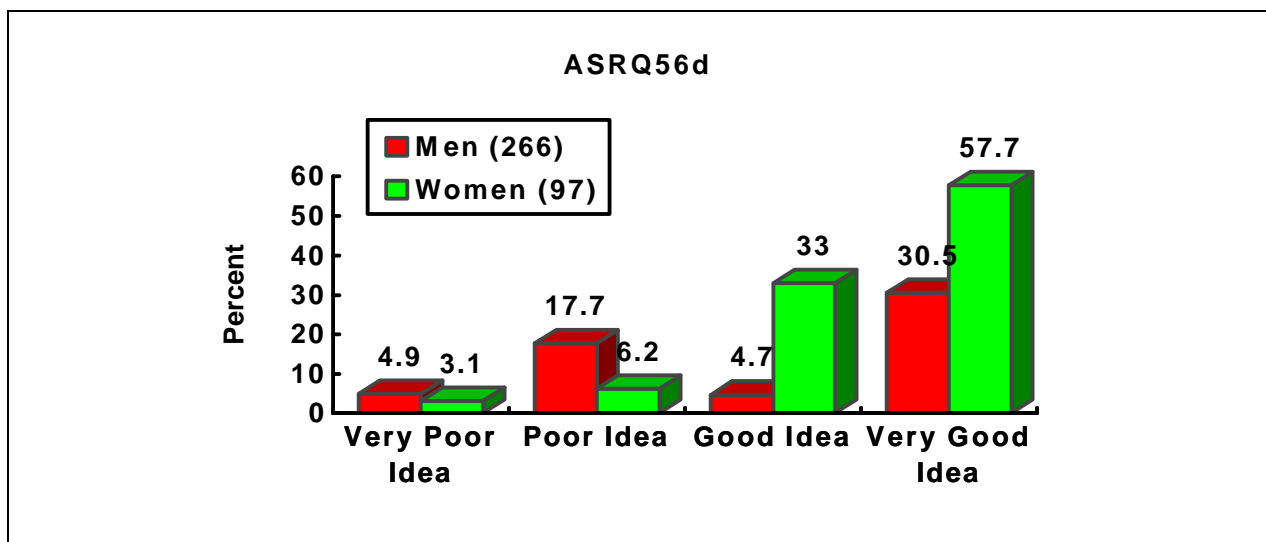
- The college should be mandatory, as should some continuing education. Too often we are preaching to the choir. Maybe California Rules of Court, rules 205 and 206 should be amended to give presiding judges more authority. I personally have tried in vain to get some of our most needy judges to go.
- If the lawyers have mandatory education, why shouldn't we?
- If California judges are to remain well respected, they must be current. I do not believe this can be assumed unless it is required. It is one way to assure litigants that serving judges are continuing every effort to serve ably and fully.¹³

At every regional meeting and every public hearing, the advisory committee heard testimony supporting increased education on gender bias for judges. Generally, witnesses testified that the laws, with some exceptions, appeared to be gender-neutral, but that the application of the laws and the exercise of judicial discretion were not. This was especially true in family law. There was testimony about specific educational needs as well. Clerks discussed the need for judges to be educated about their obligations as managers, including awareness of affirmative action and sexual harassment issues. Domestic violence lay advocates urged increased judicial education on the life experiences of battered women, especially the reasons they may recant or be unable to properly complete an application for a temporary restraining order. These advocates also stressed the need for judges to understand the consequences of issuing a mutual restraining order when only one party has requested it and there is no evidence of mutual violence.

¹² Cal. Standards Jud. Admin., § 25; eff. Jan. 1, 1990.

¹³ Judges' Responses to Governing Committee's Nov. 17, 1989, survey on CJER's Judicial Education Services (Jan. 2, 1990).

Most significantly, judges themselves selected judicial education as the most important and effective remedy for gender bias in the courts. Judges were asked on the survey: "Assuming that judicial conduct on occasion reflects or results in gender bias, what additional remedies (if any) do you think would be most effective?" They were asked to rate a series of six proposed remedies, one of which was "There should be *increased* judicial education on the subject" (emphasis added). This choice was selected as either a very good idea or a good idea by the largest percentage of judges responding to the question. A graphic depiction of these responses appears below and shows that 90.7 percent of the female judges and 77.5 of the male judges thought that increased judicial education regarding gender bias would be a "good idea" or a "very good idea."¹⁴



2. THE NEED FOR IMPROVEMENT IN CURRICULUM AND TEACHING METHODS

CJER's report to the advisory committee on the educational programs on gender bias contained in Appendix N of this report reveals extensive coverage and significant accomplishments. One might well ask, what more can be done? Many of the advisory committee members served as presenters and planning committee members for these judicial education programs during and prior to the three years of their tenure on the advisory committee. As a result, the committee members recognized some limitations in the current gender bias programs and developed several suggestions for a shift in the focus and content of these programs, the improvement of which is ongoing. These suggestions were:

¹⁴ Judges' Survey, question 56.

- While fairness courses that address biases of all kinds are essential components of the judicial education program, they are not enough. Gender bias issues should be incorporated into the substantive law programs at every level.
 - There is an urgent need for CJER to develop curriculum and materials that incorporate the information in this report.
 - After a careful planning process is completed, judicial education in family law should be mandatory for all judges who regularly or occasionally hear family law matters. The educational plan should take into consideration the need to keep the courts fully staffed in order to continue the work of eliminating delay and backlog.
 - New teaching techniques should be developed that address the difficulty of the subject matter and the potential for hostility.
 - Gender bias should be made a permanent part of CJER's curriculum, so that new issues are addressed and new judges are educated about these crucial issues.
- **Beyond the Fairness Course**

As this report demonstrates, gender bias is a subtle and complex phenomenon that has its genesis in the historical and social biases of the society in general. Moreover, stereotypes derived from sex roles are different from those based on racial or ethnic biases. At some point in the overall education program, these stereotypes must be discussed with particularity—otherwise their specific, pernicious effects may become lost in a general discussion. As Lynn Hecht Schafran explained to the 1986 Conference of Chief Justices:

Effective judicial education about gender bias means providing judges with an opportunity to understand in concrete and specific ways how the three aspects of gender bias—stereotyped thinking, society's perceptions of the relative worth of women and men, and myths and misconceptions about the economic and social realities of women's and men's lives—affect decision-making and the courtroom environment.¹⁵

¹⁵ Countering Gender Bias in the Courts Through Judicial Education, by Lynn Hecht Schafran, Conf. of Chief Justices and Conf. of State Court Administrators, Annual Meeting, Omaha, Neb.; Aug. 5, 1986, p. 4 [hereinafter "Schafran Address"], on file at the AOC.

The most effective way to discuss the specific and concrete ways that gender bias operates in our courts is through meaningful hypotheticals. These hypotheticals should be based on real cases on topics of current and practical interest to judges. Such "real life" hypotheticals should be integrated into CJER's existing course work.

- **Enriched Curriculum and Materials**

While this report was being researched and written, planning committees for CJER programs often asked advisory committee members and the Administrative Office of the Courts for assistance in incorporating gender bias issues into CJER institutes and other programs. Because the committee's research was incomplete and its recommendations not yet considered by the Judicial Council, it was difficult to meet this need for information and materials. Thus, CJER's conscientious planning committees were somewhat at a loss, forced to start from scratch with limited time and resources to plan programs or program components that illustrated problems of gender bias in specific areas.

As these planners recognized, an appropriate curriculum and good materials germane to the issues presented are essential ingredients to ensure a successful program on gender bias. The development of these ingredients is time-consuming and difficult. The material in this now completed report should assist CJER's ongoing effort to incorporate gender bias into its curriculum.

The most significant factor in successfully educating judges on gender bias is counteracting a lifetime of stereotypes about men and women and misconceptions about their relative worth. While it is sometimes said that our adversary system relies on a fact finder who receives evidence as a tabula rasa, without any preconceptions, in fact every person, judge or juror, views the facts through his or her own life experiences. Indeed, it would be absurd to suggest that a lifetime of knowledge does not affect the judge's determination of credibility or the exercise of discretion. For example, a judge may have considerable knowledge about construction, having been employed as a construction worker while in college, but have no idea what it costs to raise children or how likely it is that a woman of 53 with no education or job skills will quickly find employment.

The only way to counteract a lifetime of skewed or incomplete information is to provide additional information from other sources, thereby allowing decision making to be truly balanced and neutral. This need is particularly urgent in areas such as family and juvenile law, where judicial discretion is vast and where closely held personal views, such as the proper role of women in our society or the proper rearing of young children, may affect decision-making.

- **Mandatory Education in Family Law**

The need for judicial education in family law has been amply documented and fully discussed in the chapter of this report on family law. It is important to note, however, that the committee unanimously determined that eventual mandatory courses for all judges who regularly or occasionally hear family law matters is essential to gender fairness in the courts. As the final report of the Senate Task Force on Family Equity put it:

The high volume, complexity, and impact on people's lives of family law cases require an educated, fair, and efficient family law judiciary. Continuing judicial education on family law, while not a panacea, is necessary to eliminate gender bias and sensitize judges to the economic consequences of their decisions.¹⁶

At every public hearing, citizens came before the advisory committee relating anguished tales of custody decisions that they considered gross miscarriages of justice. Many of the witnesses believed that the judges who decided their cases were untrained and uninterested in being trained to decide issues of such crucial importance to their lives. Judges and law professors corroborated this view. The advisory committee was deeply concerned about the appearance of impropriety created when such deeply important decisions about families are made every day in our courtrooms without an accompanying commitment to educating the decision makers.

- **New Teaching Techniques**

According to advisory committee members who have participated in judicial education programs on gender bias, these programs are sometimes met with hostility or contempt. Judges sometimes either fail to take the subject matter seriously or sincerely believe that education on the subject is not necessary. Judicial educators are struggling with the dilemma of how to find new ways to teach issues of gender bias that will be useful to judges and will minimize antagonism. Judge Susan P. Finlay, former Dean of the California Judges College,¹⁷ stated at the San Diego public hearing:

It's particularly challenging to educate judges in this area, because judges think of themselves as fair. To be impartial, objective, and bias-free is the goal of our profession. To suggest, or even hint that judges' decisions may be affected by bias is to threaten the very core of our professional being and self-image.¹⁸

¹⁶ Senate Task Force on Family Equity Final Report (June 1987), p. II-2.

¹⁷ The California Judges College has been renamed and is now known as the B.E. Witkin Judicial College of California.

¹⁸ San Diego public hearing transcript, p. 28

Judge Marie Bertillion Collins echoed these views:

Our judicial training programs are programs in transition. They are programs that are growing, that are developing, that are changing as we learn by our experiences in trying to deal with the issues. And I also want to point out that these issues go beyond the issues of say, judicial fairness, how litigants and people are treated in the court. . . .

It means you need new teaching techniques, but it also means you need special teaching techniques when you're giving a message that people often don't want to hear, or are reluctant to hear, or feel it's a little insulting to hear.¹⁹

As Dr. Wikler has noted, "Educating judges about gender bias, particularly their own, is not like acquainting them with new features of the tax code."²⁰ Because "gender bias is inevitably a sensitive, sometimes explosive, issue"²¹ and because judges present specific pedagogic challenges, including their general preference for fellow judges as teachers and their distrust of social science data, Dr. Wikler has identified four overarching pedagogical principles to employ in judicial education on gender bias. They are:

- Provide concrete information, including technical and specific information that is directly related to judicial activity.
- Make suggestions for change and identify affirmative steps judges can take to eliminate bias from their conduct and decision-making.
- At every opportunity confer upon the material and those who teach it the legitimacy the subject deserves by giving it priority in the overall program and by selecting credible and respected teachers.
- Inspire judges to take a personal interest in ensuring that our courtrooms are free from gender bias.²²

A necessary component of developing new techniques for teaching issues of gender bias is training the faculty. As many faculty members, both those who were members of the advisory committee and those who were not, can attest, teaching these

¹⁹ San Francisco public hearing transcript, pp. 87–88.

²⁰ Wikler, *Educating Judges*, *supra*, p. 236.

²¹ *Ibid.*

²² *Id.*, pp. 237–39. As Wikler notes, "[a]n especially potent technique for securing personal involvement of male judges in ending gender bias was emphasizing the effects of bias on the judges' own daughters." *Id.*, p. 239.

issues is not easy. Special training and support are crucial to the success of the programs. Judges who teach gender bias programs sometimes meet with hostile responses and caustic evaluations. Judge Collins spoke about the particular difficulties teaching gender bias poses for women judges. She said: "Now, when a woman teaches, as I have, and as some of you have, your words are often seen as special pleadings. For those of you who see women judges as something other than real judges, the words don't have the authority."²³

- **Gender Bias as a Permanent Part of the Curriculum**

A second point made by Schafran in her speech in 1986 to the gathered Chief Justices concerned the need for institutionalization of programs on gender bias. She stated:

In developing a judicial education program about gender bias, it is important to appreciate that this is a problem that has evolved over millennia and cannot be eliminated by a single course. To achieve lasting reform, gender bias issues must become a permanent part of the orientation for new judges and the continuing curriculum for those already on the bench.²⁴

The advisory committee has also concluded that gender bias must be made a permanent part of the CJER curriculum.

D. JUDICIAL EDUCATION ON GENDER BIAS: THE COURSE CONTENT

Each of the chapters in this report devoted to an area of the substantive law has discussed, where appropriate, the specific issues that deserve more attention and focus in judicial education programs on gender bias. The Judges' Survey solicited judges' views about where increased attention on gender bias issues is needed. The areas that have been suggested for study by the advisory committee and by judges in response to the survey are summarized in Appendix A to this chapter. The advisory committee has recommended that these issues be incorporated into future judicial education programs.

E. CONCLUSION

The advisory committee has determined that judicial education on gender bias is *the most vital and effective tool* for correcting the problems identified in this report. Successful programs, however, depend upon integrating gender bias into the substantive course curriculum, providing new and relevant information, especially in family and juvenile law, moving toward mandatory requirements, developing new teaching

²³ San Francisco public hearing transcript, p. 91.

²⁴ Schafran Address, *supra*, p. 9.

techniques, training the faculty, and exploring new issues of concern. The advisory committee's education recommendation has been designed to address these concerns by (1) encouraging new judges to attend orientation programs and the judges' college; (2) ensuring that these programs have gender bias components; (3) developing a mandatory program in family law; (4) creating a curriculum development committee; and (5) developing a program to instruct the faculty. The recommended changes in judicial education should be highly useful to educational efforts relating to racial and ethnic bias as well.

Chapter Ten

The Future in California

A Majority of Minorities

I. DEMOGRAPHICS

"Due primarily to the large numbers of people immigrating from Asia and Latin America, the population of California is quickly becoming a majority of 'minorities,'" stated a representative of California Women of Color Against Domestic Violence in a report submitted to the advisory committee.¹ The exponentially increasing cultural diversity in the United States has been noted by those studying the future of the court system. Figures reported at the American Judicature Society annual meeting in Toronto in 1988 reflect the following:

Immigration now is often from South America . . . and increasingly from Asia. Hispanics in the United States were roughly four million in 1950. They are 18 million now and possibly will be 50 million by 2020, displacing blacks as the largest "minority" in the United States. But the fastest growing "minority" is Asian American. It grew by 142 percent between 1970–80, and may double to over eight million by 2000. Asians presently account for 40 percent of immigrants to the United States. Also, whereas Japanese Americans were once the largest Asian group, they have been replaced by Chinese Americans, who are being overtaken by Filipinos, and they by Koreans. By 2010, the number of Vietnamese and Asian Indians in the United States will also surpass the number of Japanese Americans. *The result is greatly increased cultural diversity.*² (Emphasis added.)

California is in the forefront of this national demographic trend. Statistics provided by CWOCADV reveal that in 1987, out of a total state population of 26.1 million, 7.5 percent were African American, 21 percent were Latino, and 7.5 percent were Asian. CWOCADV projects that, by the year 2010, of 42.7 million people in the

¹ California Women of Color Against Domestic Violence (CWOCADV) Gender Bias Testimony, p. 1, on file at the AOC [hereinafter "report submitted by CWOCADV"].

² Panel Discussion, *The Changing Face of America—How Will Demographic Trends Affect the Courts?* (1988) 72 Judicature 126.

state, 16 million will be Latino, 16 million will be white, 6.7 million will be Asian, 2.9 million will be African American, and .5 million will be classified as "other."

The advisory committee conducted its study of gender bias in the courts in California—a populous, heterogeneous state characterized by increasing racial and cultural diversity. This reality led the advisory committee to make the question of gender, racial, and ethnic bias a special focus.

II. THE MULTIPLE EFFECTS OF BIAS BASED ON RACE, ETHNICITY, AND GENDER

Scholars have called the ways in which gender and race interact in the lives of women of color "intersectionality."³ As one author put it:

Although racism and sexism readily intersect in the lives of real people, they seldom do in feminist and anti-racist practices. And so, when the practices expound identity as woman or person of color as an either/or proposition, they relegate the identity of women of color to a location that resists telling.⁴

An African-American woman attorney told the committee at a regional meeting in San Francisco: "Because women encounter different stereotypes and biases depending upon their race, *an inquiry into gender bias must always be an inquiry into race and gender*. The past and the present tell us that it is not a question of race versus gender, but a question of race *and* sex. The question is not whether a black woman is subjected to race or gender bias. She faces discrimination on the basis of her race and her gender, just as white women encounter other biases and stereotypes because of their race."⁵ This phenomenon has been referred to colloquially as the "double whammy" of race and color.

In its developmental stages and thereafter, the advisory committee acknowledged fully that conducting a study of gender bias without also addressing the effects of racial and ethnic bias would be an incomplete effort. The initial Judicial Council committee charged with reviewing the reports from New York and New Jersey and making recommendations to the council, one of which included the establishment of the Advisory Committee on Gender Bias in the Courts, found that the focus on gender alone was insufficient. One of its recommendations was to adopt a Standard of Judicial Administration that created a judicial duty to refrain from exhibiting biased behavior

³ Volpp, *(Mis)identifying Culture: Asian Women and the Cultural Defense* (1994) 17 Harv. W.L.J. 58 [hereinafter *Asian Women and the Cultural Defense*].

⁴ Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics and Violence Against Women of Color* (1991) 43 Stan.L.Rev. 1242 [hereinafter *Mapping the Margins*].

⁵ San Francisco regional meeting summary, p. 4.

and to prevent such behavior on the part of others in the courtroom. The standard that was adopted was extended unanimously to include all forms of bias.⁶

III. THE NEED FOR A TASK FORCE ON ETHNIC AND RACIAL ISSUES OF BIAS IN THE COURTS

While recognizing the extreme importance of an inquiry relating to race, ethnicity, and sex, the advisory committee also became keenly aware of its own limitations. The committee's charge was clearly limited to issues of gender, and an independent and comprehensive investigation was needed on racial and ethnic bias as well. Issues of racial and ethnic discrimination require consultation with many communities. A committee devoted to studying such discrimination would necessarily consist of different individuals with special expertise in the applicable fields of study. A different methodology might well be required to discern the subtleties and the complexities of the problem. And, as the attorney who spoke at the regional meeting stated so eloquently, ethnic and racial minorities suffer from differing sets of stereotypes depending on the cultural underpinnings of their experiences. In light of these concerns, the advisory committee determined that it would endeavor to accomplish the following:

- Study wherever possible the multiple effects of racial and ethnic bias and gender bias by examining the issues presented with respect to women of color;
- Include wherever appropriate recommendations that apply equally to racial and ethnic bias;
- Include in its report a discussion of the multiple effects of racial, ethnic, and gender bias; and
- Recommend the establishment of a racial and ethnic bias task force to document fully these issues and submit recommendations to the Judicial Council.

The committee met these goals. Many of the recommendations in this report apply equally to racial and ethnic bias. The model rules suggested for the appointment of counsel apply equally to gender and race and ethnicity. The recommendations applicable to the ethical duties of judges and attorneys likewise apply equally to racial and ethnic bias. The discussion of membership in discriminatory clubs applies not only to those excluded because of gender, but also to those excluded because of race or ethnicity. Special problems of women of color and non-English-speaking women in domestic violence have been addressed. The plight of poor women in the family law court, the majority of whom are women of color, has been highlighted. The special

⁶ Cal. Standards Jud. Admin., § 1.

needs of incarcerated women, the majority of whom are women of color, have been emphasized. These are only a few examples of the ways in which the advisory committee sought to meet its responsibilities to the courts and to the culturally diverse citizens of California.

The committee members realized, however, that this is not enough. Racial and ethnic discrimination in California is a vast area of inquiry and should be given the independent and thorough scrutiny it deserves. Accordingly, in February 1990, as this report was going to press in draft form, the Chief Justice announced that a task force on ethnic and racial bias would soon be created. In the first "State of the Judiciary" Address by a Chief Justice to a joint session of the California Legislature, Chief Justice Lucas stated:

Our efforts are aimed not simply at improving a statistical bottom line but rather at assuring every individual fair and expeditious treatment in our courts. To further this goal, an advisory committee on gender bias held several public hearings in 1989 and collected data from various sources. It soon will report to the Judicial Council. I also announced last fall the creation of a committee to study issues of race and ethnic bias to assure that our courts meet the needs of our diverse population. I am pleased to announce that Associate Justice Allen Broussard, my colleague on the Supreme Court, has agreed to serve as co-chairperson of the committee whose other members will be named soon.⁷

Chief Justice Lucas' foresight made the recommendation devised by the advisory committee unnecessary. It is offered here, however, as an expression of the committee's support for the concept and for whatever assistance it may provide to the racial and ethnic bias committee.⁸

⁷ "State of the Judiciary" Address by Malcolm M. Lucas, Chief Justice of California, Joint Session of the Legislature, Sacramento, Feb. 12, 1990.

⁸ Appointed by Chief Justice Lucas in 1991, the Judicial Council Advisory Committee on Racial and Ethnic Bias in the Courts has now conducted public hearings, issued a summary of public hearing testimony, and expects to issue a report and recommendations in 1996.

The advisory committee members adopted the following recommendations:

RECOMMENDATION 1

Request the Chief Justice to appoint an advisory committee to examine racial and ethnic bias in the California courts and make recommendations to the Judicial Council to correct any problems identified. The advisory committee should be characterized as follows:

- (a) It should be structured to maximize its operational independence;**
- (b) The co-chairs should be appointed first and subsequently asked to submit their recommendations to the Chief Justice for the remainder of the committee appointments. The recommendations should reflect the goal of securing primary participation by members of the various ethnic and racial communities in California;**
- (c) The first task of the committee will be to develop its working definition of racial and ethnic bias in the court system and to adopt an agenda of the topics it plans to consider. In developing a working definition of racial and ethnic bias, the advisory committee may wish to consider the following suggested definition:**

Racial and ethnic bias includes behavior or decision making of participants in the justice system that is based on or reveals (1) disparate treatment of individuals based on race or ethnicity; (2) stereotypical attitudes regarding race and ethnicity; or (3) lack of understanding or misconceptions about racial and ethnic cultural differences and life experiences.

In developing a list of topics to consider, the appointed advisory committee may wish to consider the following suggested topics:

- Courtroom interaction**

- **Judicial fact finding and decision-making**
- **Racial and ethnic bias within judicial administration, including court employment**
- **Selection, hiring, or retention of court-appointed counsel and ancillary officials, including security staff**
- **Hiring, promotion, and retention of attorneys**
- **Jury selection**
- **Juvenile justice**
- **Criminal law including disparity of treatment**
- **Sentencing and probation, including diversity of probation officers**
- **Family law–related issues including custody and support**
- **Continuing education for judges, lawyers, and court staff**
- **Housing and landlord-tenant issues**
Special problems of non-English-speaking persons, especially with respect to the need for interpreters
- **Ways in which the perception of bias impedes access to the court system and full participation in court proceedings**
- **Other factors, such as economic status, which diminish access to the court system.**

RECOMMENDATION 2

Urge the Chief Justice to call for the joint creation of a Justice System Task Force from the different branches of government to examine racial and ethnic bias in the justice system. The Judicial Council Advisory Committee on Racial and Ethnic Bias would form only one component of such a task force, which would also include representation from similar committees formed in the Legislature, in the Office of the Attorney General, in the Governor's Office, and in the State Bar. The Judicial Council Advisory Committee on Gender Bias in the Courts particularly recommends that the inquiry on racial and ethnic issues be expanded in this way because of the committee's

recognition from its own experience that many of the solutions to these problems require a cooperative effort on the part of all justice system agencies.

IV. SUMMARY OF DATA

In response to the advisory committee's announcement of its special focus, judges, attorneys, domestic violence workers, and other experts provided the committee with valuable data concerning racial and ethnic bias. Much of the information is contained in the preceding pages under the substantive law chapter headings. A brief summary of the highlights from this testimony and some additional observations are offered here with the hope that the summary will assist the race and ethnic bias committee in its work and the Judicial Council in its understanding of the dimensions of the problem. The advisory committee found that gender and race and ethnicity combined to create more profound and difficult problems of bias, and that these problems occurred in every field of inquiry the committee examined.

A. JUDICIAL CONDUCT

Judicial conduct exhibiting racial and ethnic bias and gender bias was reported to the committee and discussed at the focus group for minority lawyers at the State Bar Annual Meeting in September of 1988.

Similar reports were presented at the regional meetings. For example, an African-American woman prosecutor told the assembled committee members: "I have personally witnessed a judge who said to me, 'I know how your people are, and I know the special and particular problems that your people have.'"⁹

Several minority women attorneys who attended the focus group told the committee that they often could not tell whether they were victims of discrimination because of their race or their sex, where one bias ended and the other began. A Fresno attorney admonished the committee: "I don't think you can look at just women without looking at also the other ways that the prejudices of this society can manifest themselves in court. I do not agree that racism is behind us in this county."¹⁰ Another attorney reported:

I want to say that yesterday I had lunch with two women attorneys: one was black and one was Hispanic. And we talked about the meeting today, and we talked. They are not here because they felt that anything that they said would be identifiable, and they felt that it would not be in their best interest to be here. We addressed how gender bias affects women of

⁹ Los Angeles regional meeting summary, p. 8.

¹⁰ Fresno regional meeting transcript, p. 150.

color. And they said, "We would like something to specifically address that."

Testimony received by the advisory committee only scratched the surface of this troubling issue. An African-American woman civil litigator was asked to attend the regional meeting and discuss her views with the advisory committee members. She refused. She told the staff attorney who had contacted her that she feared retaliation. "I have to work in this town and make a living and support my children. I cannot afford to come down and go into all that," she said. And what is more, she explained that to a great extent she had to put questions of discrimination out of her mind just to survive. The emotional price of telling the committee members her views was too dear.¹¹

Disciplinary cases that have come before the Commission on Judicial Performance also demonstrate that gender bias is often accompanied by an equally pernicious racial and ethnic bias. The committee's examination of the reported cases involving discipline of judges revealed that often the offending judicial conduct involved statements offensive to women in which racial or ethnic slurs were embedded as well. One particularly outrageous example warrants relating here. In *In re Stevens* (1982) 31 Cal.3d 403, 404, a judge was censured for conduct "prejudicial to the administration of justice that brings the judicial office into disrepute" (Cal. Const., art. VI, § 18, subd. (c)). Justice Kaus wrote a concurring opinion specifically describing the offensive conduct. Among a series of highly offensive statements made by the judge were two that demonstrate the interlocking nature of racial and ethnic bias and gender bias and how such bias undermines just decision making. Justice Kaus stated:

In connection with a child abuse proceeding involving an Hispanic defendant with a Spanish surname, Judge Stevens observed from his prior experience that (in effect) Spanish persons live by different standards than we do; that wife abuse is common and more acceptable for them; and that such abuse might explain defendant's conduct toward her child. . . .

During his term in office, Stevens used such terms as "cute little tamales," "Taco Bell," "spic," and "bean" when referring to persons with Hispanic surnames in conversations with court personnel.¹²

B. CRIMINAL AND JUVENILE LAW

The advisory committee found that racial and ethnic bias has its most serious impact in the area of criminal and juvenile law. Throughout the chapter on that subject, the committee noted those instances in which women of color suffer greater

¹¹ Staff telephone conversation, February 1989.

¹² *In re Stevens* (1982) 31 Cal.3d 403, 405; see also *Gonzales v. Commission on Judicial Performance* (1983) 33 Cal.3d. 359, 376.

discrimination than do other women and the unique ways in which bias manifests itself in criminal decision making. The committee did not, however, consider the important topic of prosecutorial discretion and sentencing, other than by reviewing alternatives to sentencing and dispositional alternatives for juveniles. Nor could the committee consider fully the plight of women of color in the criminal justice system due to the dearth of statistical information. Statistics are often delineated by gender and by race or ethnicity, but not by both: Women of color are quite literally not counted. Criminal and juvenile law is vital to any study of racial and ethnic bias in the courts. Two issues are particularly important. First, there is a need to understand the overrepresentation of African Americans in the criminal justice system and how African-American women fit into this general picture. In this regard, the committee was particularly influenced by a landmark article by Professor Norval Morris, professor of law and criminology at the University of Chicago.¹³ Professor Morris' article included a summary of these facts:

- For every one white male in prison, more than seven African Americans are in prison.
- Of every 12 African-American males in their 20s, 1 in every 12 is in prison or jail.
- Of all African-American babies born, 1 in 30 will die a victim of intentional or non-negligent homicide, and among African-American males and females, ages 15 to 44, the leading cause of death is homicide.
- African Americans are not more likely than whites to be persistent offenders.
- An increasing number of African Americans have moved into the middle class, leaving the inner city neighborhoods with their astronomical crime rates to those left behind.¹⁴

The picture is similarly bleak when the focus is on California. The *Los Angeles Daily Journal* has reported:

If you are a black Californian, your chances of being arrested are seven times as great as a white Californian's. Your chances of being sent to prison are nine times as great, and your chances of getting a death sentence are 12 times as great.

Authorities on crime and society suggest a number of reasons why: more crime in black communities, too much or too little police vigilance in the ghettos, bias against blacks in the criminal-justice system and the society at large, and poverty and its devastating consequences on people of all colors.

¹³ Morris, *Race and Crime: What Evidence Is There That Race Influences Results in the Criminal Justice System?* (1988) 72 *Judicature* 111, 113.

¹⁴ *Id.*, p. 111.

Whatever the explanation, specialists agree that in the relationship between blacks and the law, all is not well in California.¹⁵

In light of the startling statistics on African Americans and the criminal justice system, Professor Morris called for immediate study of the following important questions: "Does the criminal justice system discriminate unfairly against blacks at arrest, convictions, and at punishment? Is the death penalty applied unfairly to black killers and yet insufficiently to protect black victims? Do the police disproportionately use deadly force against suspected black felons? If there is injustice in all this, what are the remedies?"¹⁶ These issues require urgent attention.

Second, there is a need to understand how cultural issues affect criminal prosecution, especially in a state as heterogeneous as California. The committee was particularly moved by the story of the young Japanese mother who, distraught over her husband's infidelity, waded into the surf to commit *oyako-shinju*, or parent-child suicide. Two young children were killed, but the mother survived. As Professor Deborah Woo has explained:

Had Kimura's suicidal act been committed in her native Japan, it is doubtful that an interpretation of personal, individualistic "irrationality" would have prevailed. From a Japanese perspective, her multiple suicide attempt with her two young and totally dependent children was comprehensible, "understandable and unavoidable." . . . The children were not seen as independent, autonomous beings but as extensions of the self with their destinies interwoven. The American court system however, could not acknowledge any such "cultural imperative" as part of a formal defense. Indeed, any admission of intent-to-kill would have been incriminating. The only plausible defense had to be one that proved the defendant mentally incapable of the rational planning of such actions. Psychiatric testimony on Kimura's behalf served the very purpose of establishing her legal insanity. . . . Through such reasoning, the cultural reality of *oyako-shinju* was effectively nullified and converted into a psychological pathology which was devoid of any socially based understanding.¹⁷

Other examples of the clash between "Asian" culture and "American" jurisprudence abound in the literature. Stereotypes about "Asian" culture have contributed to the perpetuation of domestic violence, especially through leniency for

¹⁵ *State Legal System Riddled with Racial Distinctions* (March 9, 1988) Los Angeles Daily Journal, p. 6. But cf. Klein, Petersilla, and Turner, *Race and Imprisonment Decisions in California* (1990) 247 Science 812. (Rand Corporation researchers studied 11,553 California offenders convicted in 1980 of certain crimes and concluded that, for five of the six crimes studied, "California courts are making racially equitable sentencing decisions.")

¹⁶ *Id.*, p. 112.

¹⁷ Woo, *The People v. Fumiko Kimura: But Which People?* (1989) 17 Int'l J. of the Sociology of Law 403, 418.

batterers, and to harsh judgment of newly immigrated, mentally distraught, mothers.¹⁸ The point is not to forgive violations of United States law, but rather to encourage judicial sensitivity to cultural differences and to provide for full, accurate interpretive services in these cases.¹⁹

C. DOMESTIC VIOLENCE AND FAMILY LAW

The report of California Women of Color Against Domestic Violence (CWOCADV) provided the committee with an excellent summary of the ways in which the unique problems of women of color in domestic violence and family law have been ignored in California. In summary, the report emphasized:

- Women of color often do not know the legal rights and remedies available to them. There is very little bilingual and "culturally appropriate" information provided, and service providers, law enforcement, and court personnel have little training in or understanding of communities of color.
- Language and cultural barriers exist that impede women of color who are trying to obtain temporary restraining orders in a domestic violence matter or other necessary orders in a family law matter. There is no right to an interpreter in either area of law.²⁰ Yet, mediation is nearly impossible without a bilingual mediator. Cultural views and values may prevent a woman from going for help. Some of these cultural norms include (1) the belief in some cultures that women's role is to be subservient; (2) the value of the extended family and the cultural disapproval directed toward those who go outside the family to solve problems; and (3) the shame associated with divorce.

¹⁸ See, e.g., *Asian Women and the Cultural Defense*, *supra*, p. 59 (criticizing juxtaposition of "Asian" and "American" culture as ignoring the importance of immigrants from a variety of countries in Asia to the American experience and describing criminal cases in which a Chinese man killed his wife for infidelity; a Korean woman left her small children at home one night; and a Chinese woman strangled her son); see also *Sanctuary for Abused Asians* (Nov. 6, 1988) San Francisco Examiner, p. B1 (stating that the "Asian notion that a wife should be subservient to her husband, as well as the fear of bringing shame to the family, often prevent battered Asian women from calling the police").

¹⁹ Woo's article on *oyako-shinju* suggests that the defendant suffered from a lack of adequate interpreters. Not only were questions raised about the translation of the Miranda warning given to the defendant at the time of her arrest, but also during the trial "Japanese Americans sitting in the audience . . . observed that the translator tended to paraphrase and simplify meanings, thereby losing much of the content, and in some cases, varying the meaning"; Woo, *supra*, pp. 408–09.

²⁰ Proposed legislation is pending that would require court interpreters at public expense in domestic violence proceedings. See Sen. Bill No. 982 (1995 Reg. Sess.).

- The immigration status of women of color may block their way in trying to obtain relief in the courts. Even if a woman's status is legal, a batterer may threaten to report the woman to the immigration officials and cause problems nonetheless. The woman may fear as well that bringing her husband into court may threaten his immigration status, and she may depend on him emotionally and financially.
- Representation and legal services are grossly inadequate.
- Law enforcement may fail to respond to a call for help, especially from women who live in crime-ridden neighborhoods.
- Judges may have cultural biases that prevent women from obtaining relief. For example, a judge may believe that violence is part of the woman's culture and not take it as seriously. The system's protection of the victim is simply not as vigorous if she is a minority person.²¹

Attorneys and others at the regional meetings and public hearings recognized these problems. Women of color are more likely to be from low-income backgrounds, and therefore to have little choice but to turn to the justice system for help.²² As one professor summarized the situation:

Many women of color . . . are burdened by poverty, child-care responsibilities, and the lack of job skills. These burdens, largely the consequences of gender and class oppression, are then compounded by the racially discriminatory employment and housing practices women of color often face, as well as by the disproportionately high unemployment among people of color that makes battered women of color less able to depend on the support of friends and relatives for temporary shelter.²³

The author called for solutions to domestic violence that specifically address the needs of women of color, including language barriers, cultural resistance, immigration issues, and poverty.

D. GENERAL BARRIERS TO ACCESS TO COURT

1. LACK OF ACCESS TO THE COURTS

The chapter of this report relating to family law describes with particularity the problems of poor women who have no money for legal representation. Legal services offices that once offered free services in family law are limiting or deleting their family

²¹ Report submitted by CWOCADV, *supra*, pp. 2–7; see also San Francisco public hearing transcript, pp. 282–87; Los Angeles public hearing transcript, pp. 259–63.

²² See Butte County regional meeting summary, p. 12.

²³ *Mapping the Margins*, *supra*, pp. 1245–46.

law caseload. Family law is increasingly a court for unrepresented parties. Attorney's fees at the time of the temporary order are increasingly being denied. Other barriers, such as job searches and enrollment in English classes, directly affect poor women, the majority of whom are members of a racial or ethnic minority.

2. PROFESSIONAL ISSUES FOR ATTORNEYS

In general, attorneys reported that racial and ethnic bias undermined their professional advancement and harmed them psychologically. Testimony described in the courtroom demeanor and civil litigation chapter indicated that minority women can be stereotyped, as was the anti-trust attorney who happened to be African American and diminutive in stature and who failed to convince judges and male colleagues of her ability to handle complex economic issues.²⁴ One woman attorney wrote to the committee, stating:

It is generally agreed, even by male attorneys, that gender bias is rampant in the South County. . . . Equally disturbing is that, with [some] . . . exceptions, our judges sometimes exhibit other discriminatory attitudes toward persons who are generally discriminated against on [the] basis of race, religion, national origin, and sexual identification. *God help the minority who represents a minority.*²⁵ (Emphasis added.)

Work by bar associations confirms the difficult challenges women of color attorneys face. For example, the Bar Association of San Francisco commissioned a study to determine if "differing patterns exist in the hiring and work experiences of minority lawyers in comparison to white attorneys"²⁶ The study sought "to furnish a description and analysis of the hiring, work experience, and promotion/retention experiences of white and minority attorneys."²⁷ In concluding that "ethnic minorities, as a class, encounter objective and subjective disadvantage within the legal profession in San Francisco,"²⁸ the study found:

- Minorities earn significantly less than white attorneys at similar points in their careers.
- There are significant differences between the hiring experiences of white and minority attorneys.
- Minorities are not well represented in both small and large firms.

²⁴ San Francisco regional meeting summary, pp. 10–11.

²⁵ Written comment, received July 28, 1988, on file at the AOC.

²⁶ Bar Association of San Francisco Minority Employment Survey: Final Report (Apr. 18, 1988), p. 1 (prepared by Troy Duster, David Minkus, and Colin Samson; Dept. of Sociology, U.C. Berkeley), on file at the AOC.

²⁷ *Ibid.*

²⁸ *Id.*, p. 26.

- Over twice as many minorities as whites report being passed over or denied a promotion.
- A significant majority of minorities and a large percentage of white attorneys believe that racial discrimination frequently occurs in hiring and promotion in different legal environments.
- The findings suggest that equally qualified minorities are less likely to achieve the income and status of their white counterparts.²⁹

A recent national study³⁰ by the ABA's Multicultural Women Attorneys Network made the following findings:

- The combination of being an attorney of color and a woman is a double negative in the legal marketplace, regardless of the type of practice or geographic region involved.
- Multicultural women attorneys perceive they are "ghettoized" into certain practice areas and other options are closed or implicitly unavailable.
- Multicultural women attorneys must repeatedly establish their competence to professors, peers, and judges.
- As evidenced by continuing attitudes and negative stereotypes, multicultural women attorneys are invisible to the profession and have more difficulty achieving prominence and rewards within the legal field.
- To succeed, multicultural women attorneys must choose between race and gender.
- Minority women lawyers face barriers of gender discrimination in minority bar associations and race discrimination in majority bar associations.

3. COURT EMPLOYEES

Court employees can be both sources and victims of racial and ethnic discrimination. Attorneys report that court employees, including court reporters, bailiffs, and clerks, have on occasion treated minority attorneys with less respect than nonminority attorneys. Attorneys at the focus groups discussed this issue, relating anecdotes about how they are sometimes mistaken for defendants in criminal matters—despite clear indicators of their status such as a three-piece suit and an attaché case.³¹ On the other hand, court employees can themselves be subjected to discrimination. For

²⁹ *Id.*, pp. 24–25.

³⁰ ABA's Multicultural Women Attorneys Network, *The Burdens of Both, the Privileges of Neither* (1994), p. 9.

³¹ See also *Black Women Lawyers Coping with Dual Discrimination* (June 1, 1988) ABA Journal 64 (describing experiences of black women attorneys who are mistaken for defendants and court reporters: "They must brandish their briefcases when entering courtrooms in order to appear obviously what they are in fact").

example, in 1984 a Southern California court adopted a local rule prohibiting court employees from speaking Spanish in the courthouse. The rule required court clerks to speak English during lunch breaks and personal telephone calls, as well as when performing official duties. This practice was ultimately enjoined by a federal court, but only after a vigorous defense by counsel retained by the judges of the court.³²

E. LANGUAGE BARRIERS TO ACCESS TO THE COURTS

As illustrated by the previous example, language barriers and discriminatory policies have been applied to court employees. The situation for the non-English-speaking litigant is much more serious. Civil litigants are not entitled to court interpreters as a matter of right. Even when court reporters are required, their availability, fairness, and accuracy have been challenged. In particular, an investigative report in the *San Jose Mercury News* included the following allegations: that courts are using almost anyone to interpret; that more than two-thirds of the state's interpreters have failed the state competency test, or there is no state test administered in the particular language; that there is no accountability and no system for removing bad interpreters; that the right to a court interpreter in a criminal case is not always enforced; and that the lack of training programs has created a critical shortage of interpreters. The problem is especially serious in light of the large non-English-speaking population in California. As the *San Jose Mercury News* report stated:

In the nation's largest immigrant state, thousands of defendants and witnesses who don't speak English are at the mercy of incompetent interpreters, their only link to understanding events in the courtroom.

Day after day, untrained, unethical, and unskilled interpreters throughout California distort testimony, give legal advice, or sometimes simply don't translate what occurs in court. While the state has many qualified interpreters, many others mangle the notion of fairness at the heart of the American legal system: that a defendant be allowed to tell his story in his own words and hear what his accusers say against him.³³

Witnesses at the regional meetings recognized these concerns as well. One Los Angeles attorney reported that judges will often ignore the need for an interpreter.³⁴ A second Los Angeles attorney noted that unrepresented parties who do not speak English are asked to stipulate to a temporary judge in civil matters without any knowledge either of the nature of the stipulation or the court proceeding.³⁵ A Fresno attorney told the committee members:

³² *Judges Seek Supreme Court Review on English-Only Ruling* (Mar. 17, 1989) *San Francisco Banner-Daily Journal*, p. 6.

³³ *How Court Interpreters Distort Justice* (Dec. 17, 1989) *San Jose Mercury News*, p. 1.

³⁴ Los Angeles regional meeting summary, p. 16.

³⁵ *Ibid.*

I represent a lot of Southeast Asians. Fresno has a booming huge Southeast Asian population. There's 23,000 Hmong in Fresno County. It's the largest gathering of Hmong outside of Situ (phonetic) in Thailand. There's more Hmong in Fresno than in any other place in Laos, because they're mainly a rural folk over there.

With eight percent of the population, I think it would be clear that the State Bilingual Services Act requires translators. There isn't a one here.³⁶

The role of court interpreters is so crucial to fairness in the courts that the Judicial Council considered further investigation of this subject, separate and apart from the work of the gender bias and the racial and ethnic bias committees. Ultimately reform legislation was enacted and a comprehensive program relating to court interpreters is administered by the Judicial Council.³⁷

V. A NOTE ON JUDICIAL APPOINTMENTS

The advisory committee did not attempt to compile statistics on the appointment of members of racial and ethnic minorities to the bench. Informal reports suggest that too few members of minority groups are appointed to the bench compared to the number of qualified applicants and compared to their numbers in the population. Increasing the appointment of white women to the bench does nothing to increase the racial and ethnic diversity of California's judiciary, which is so crucial to fairness in our courts. One anecdote from the regional meetings expresses this need eloquently. An African-American woman attorney attended a professional dinner at which a representative from *Ms Magazine* spoke. The attorney reported:

The white woman there representing *Ms Magazine* regaled the white women present with humorous vignettes about the experiences of white women encountering gender bias. She mentioned, for example, as she went on with her stories, a feeling of some elation and relief when Sandra Day O'Connor was appointed to the Supreme Court; and she commented that, well, at least, you know, this made her feel somewhat better about the Reagan Administration because, after all, here was someone who looked like her.

Well, Sandra Day O'Connor doesn't look like me. And during the course of all of these little vignettes, this woman who was speaking never

³⁶ Fresno public hearing transcript, pp. 290–91.

³⁷ Judicial Council Agenda Materials, Committee Meetings, March 1–2, 1990, Tab 19 (highlighting a series of San Jose Mercury News articles from December 1989 on the effect of improper interpretations on the outcome of criminal cases), on file at the AOC. For current program, see Gov. Code, §§ 68560–68566, Court Interpreters Advisory Panel appointed by Chief Justice Malcolm M. Lucas.

acknowledged that she was describing the experiences of white women. Rather, she purported to discuss gender bias.³⁸

There is an urgent need for the appointment of women of color to the bench in California.

VI. CONCLUSION

This summary has demonstrated that whether one examines judicial conduct, criminal law, domestic violence, family law, or the status of professionals—gender and race and ethnicity combine to disadvantage especially women of color. Moreover, rights of access to the courts are meaningful only if representation is provided and only if litigants can understand the proceedings with the aid of a qualified court interpreter. These important issues are commended to the race and ethnic bias advisory committee for its review.

Historically, women and racial and ethnic groups have often been forced to compete for attention, for scarce resources, and for redress of grievances. In this process, women of color have been largely ignored in studies of gender bias and not specifically addressed in studies of racial and ethnic bias. The advisory committee determined that in the course of its work, women of color would not be ignored and gender and race would not become competing issues. Instead, the advisory committee strived to assist and complement the future work of the committee charged with investigating fairness for racial and ethnic groups in our courts. That committee work will be especially useful if it focuses not only on racial and ethnic issues in general, but also on the problems of women of color.

³⁸ San Francisco regional meeting summary, pp. 3–4.

Chapter Eleven

Conclusion

CONCLUSION

The Judicial Council Advisory Committee on Gender Bias in the Courts found that the gender bias embedded in our cultural and political history influences the decision-making and courtroom environment of the California justice system. The advisory committee determined that it is the special responsibility of the judiciary and the court system, which are charged with judging the conduct and resolving the disputes of others, to take immediate steps to eradicate this bias and to minimize its effects. Toward that end, this report has documented the ways in which the three manifestations of gender bias—stereotypes about women and men, judgments about their relative worth, and failures to understand the social and economic realities of their lives—can create inequities and disparities in the treatment of men and women who come before the courts. These aspects of gender bias have disadvantaged all citizens, but have especially disadvantaged women, most particularly low-income women, many of whom are members of ethnic or racial minorities.

To keep pace with the dramatic changes in California and in our courts—changes in demographics, technology, and the nature of the work force—the judiciary must respond with clear, decisive, and immediate action to ensure gender fairness in all of its decisions and practices. The advisory committee proposed concrete and specific recommendations to eradicate the effects of gender bias in family law, domestic violence cases, juvenile and criminal law, court administration, and civil litigation and courtroom demeanor. The committee has also urged the creation of an implementation committee and the development of a comprehensive program for judicial education. Finally, through this report, the committee has focused attention on the disadvantages faced by women of color in the court system and has provided documentation of the need for an advisory committee to study the issue of racial and ethnic bias in the courts.

The committee's charge was to examine and propose solutions for correcting problems of gender bias in the courts—a charge that has been fulfilled through the 68 recommendations described and supported in this report. The committee's

recommendations not only offer specific suggestions for ameliorating problems of gender bias; they also address primary concerns of the courts in general. Indeed, in many respects, the advisory committee's recommendations are consistent with and help to fulfill goals and standards for the courts that have already been proposed.¹ What began for the advisory committee as an analysis from a particular perspective, that of gender, has resulted in a plan for action that has much broader and more comprehensive implications.

Examples of gender bias recommendations in this report that mirror more all-encompassing concerns faced by the California courts are those that urge the availability of court interpreters in domestic violence matters, that address the lack of representation and inefficient processing of cases in family law courts, and that call for the universalization and enhancement of judicial education. There are many other examples of common sense reforms throughout this report. Implementation of these reforms will help to eradicate gender bias, improving the administration of justice for all Californians involved in the court system. It is in the spirit of fostering trust and confidence in this system that this report has been respectfully offered.

¹ See, e.g., Tentative Trial Court Performance Standards promulgated by the Commission on Trial Court Performance of the National Center for State Courts and the U.S. Dept. of Justice, on file at the AOC.

Chapter Twelve

Recommendations

CHAPTER FOUR: CIVIL LITIGATION AND COURTROOM DEMEANOR

A. CONDUCT OF JUDGES, OTHER BENCH OFFICERS, AND COURT EMPLOYEES

1. JUDICIAL CONDUCT

RECOMMENDATION 1

Request the Judicial Council to transmit and urge consideration by the California Judges Association of the advisory committee's recommendation that the association adopt canons 3B(5) and (6) of the Model Code of Judicial Conduct of the ABA. These canons impose the obligation on judges to perform all judicial duties without bias or prejudice, to refrain from manifesting bias or prejudice by word or conduct, to prohibit staff and others under the judges' control from engaging in similar conduct, and to require lawyers to refrain from similar conduct.

2. CONDUCT OF OTHER BENCH OFFICERS

RECOMMENDATION 2

(a) Request the Judicial Council to instruct the Advisory Committee on Private Judges, or any subsequent committee convened to review issues of ethics for other bench officers, to study and recommend a means of enforcing the appropriate standards of conduct for private judges relating to bias as stated in the ABA Model Code of Judicial Conduct canons 3B(5) and (6);

(b) Request the Judicial Council to transmit and urge consideration by the State Bar of the following advisory committee recommendation: The State Bar should formulate and adopt a Rule of Professional Conduct that requires lawyers serving as judicial officers to adhere to the ABA Model Code of Judicial Conduct sections 3B(5) and (6).

3. A FAIRNESS MANUAL FOR JUDGES AND COURT EMPLOYEES**RECOMMENDATION 3**

(a) Request the Judicial Council to instruct its staff to prepare an educational manual for judges, other judicial officers, and court personnel on fairness governing the following issues: (1) the fair treatment of and appropriate courtroom behavior toward lawyers, jurors, court staff, experts, witnesses, litigants, and others involved in the court process; (2) a suggested statement that would be optional, and that could be read or distributed in writing at the opening of trials and other appropriate proceedings expressing the court's refusal to tolerate all kinds of biases; (3) a request to the Judicial Council to amend Standard of Judicial Administration 1 to encourage judges to develop guidelines for counsel on courtesy and fairness in the courtroom.

4. INFORMAL RESOLUTION OF GENDER BIAS COMPLAINTS**RECOMMENDATION 4**

Request the Judicial Council to establish a demonstration project targeting at least three counties of varying size and in disparate geographical regions of the state to develop additional and informal mechanisms for dealing with grievances concerning biased conduct, including bias based on race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status of judicial officers, attorneys, and court personnel and report the results of the project back to the council within two years.

Nothing in this recommendation would preclude other counties from voluntarily developing similar projects or individuals from pursuing any formal remedy available for claims of misconduct.

5. MEMBERSHIP IN DISCRIMINATORY CLUBS**RECOMMENDATION 5**

Request the Judicial Council to transmit and urge consideration by the California Judges Association of the advisory committee's recommendation that the association modify its existing canon to conform to Canon 2C of the Model Code of Judicial Conduct of the American Bar Association which makes it clear that judges, as part of their ethical obligations, shall not belong to clubs that practice invidious discrimination.

B. CONDUCT OF ATTORNEYS AND RELATED ISSUES**1. ATTORNEY CONDUCT EXHIBITING GENDER BIAS****RECOMMENDATION 6**

Request the Judicial Council to transmit and urge consideration by the State Bar of the following advisory committee recommendations:

(a) The State Bar should adopt a Rule of Professional Conduct analogous to ABA Model Code of Judicial Conduct sections 3B(5) and (6) which would create a duty for all attorneys not to manifest bias on any basis in any proceeding toward any person, including judges and court employees, with an exception for legitimate advocacy when race, sex, religion, national origin, disability, age, sexual orientation, socioeconomic status, or other similar factors are issues in the proceeding;

(b) The Committee of Bar Examiners should include questions pertaining to the amendment to the Rules of Professional Conduct referred to in (a) above on the bar examination in the same manner as other questions on professional conduct; and

(c) The State Bar should conduct a major ongoing effort relating to education of the bar on issues of gender bias. Gender bias issues should be included as part of the following educational materials or programs: (i) materials

in State Bar reports; (ii) section newsletters; (iii) programs at the annual meeting; (iv) programs at bar leaders' meetings; (v) lawyer education programs; (vi) programs developed as part of mandatory continuing legal education; and (vii) training programs for members of the Judicial Nominees Evaluation Commission.

2. USE OF GENDER-NEUTRAL LANGUAGE

RECOMMENDATION 7

(a) Request the Judicial Council to adopt a rule of court regarding gender-neutral language in local court rules, forms, and documents which would make the existing standard of judicial administration on this subject mandatory;

(b) Request the staff of the AOC to review the text of all statewide rules, standards of judicial administration, and forms and recast them in gender-neutral language where necessary within a reasonable time; and

(c) Request the Judicial Council to adopt a rule of court which would require the use of gender-neutral language in all jury instructions by January 1, 1992, and to adopt in the interim, effective January 1, 1991, a rule that would require attorneys and judges to recast all standard jury instructions (CALJIC and BAJI) in gender-neutral language.

3. APPOINTED COUNSEL

RECOMMENDATION 8

Request the Judicial Council to approve in principle and instruct staff and the appropriate committee to draft:

(a) A Standard of Judicial Administration for trial courts that would provide a model local rule setting forth a policy with respect to the appointment of counsel in civil cases, including family law, and appointments as arbitrators and receivers, to ensure equal access for all attorneys regardless of gender, race, or ethnicity. The standard setting forth the model local rules shall include (i) a

recruitment protocol to ensure dissemination to all local bar associations, including women and minority bar associations; (ii) a written description of the selection process which includes a statement of minimum qualifications; application procedure, and selection procedure; and (iii) regularly scheduled recruitment;

(b) A rule of court requiring that each court establish by local rule a policy for the appointment of counsel in civil litigation, as specified above. The rule should provide that if a court fails to adopt a local rule regarding appointed counsel, the model rule contained in the standards shall be deemed the local rule; and

(c) A Standard of Judicial Administration that would provide for the selection of attorneys for bench, bar, and other court-related committees in a manner that would provide for equal access to selection for all attorneys regardless of sex, race, or ethnicity.

4. ATTORNEY EMPLOYMENT

RECOMMENDATION 9

Request the Judicial Council to transmit and urge consideration by the State Bar of the following advisory committee recommendations:

(a) The State Bar should adopt a Rule of Professional Responsibility prohibiting lawyers from discriminating in employment decisions and from engaging in sexual harassment; and

(b) The State Bar and all appropriate sections and committees should vigorously support and take immediate steps to adopt the recommendations of the Women in the Law Committee submitted in its recent survey of women and the practice of law in California.

5. MEMBERSHIP IN DISCRIMINATORY CLUBS**RECOMMENDATION 10**

Request the Judicial Council to transmit and urge consideration by the State Bar of California of the advisory committee's recommendation that the State Bar use every available means permitted by the Constitution to discourage attorneys from using for business purposes clubs that practice invidious discrimination.

CHAPTER FIVE: FAMILY LAW**A. THE APPLICABLE LAWS, THEIR INTERPRETATION, AND THEIR ENFORCEMENT****1. CHILD SUPPORT****RECOMMENDATION 1**

Request the Judicial Council to:

(a) Fund and adopt as a top priority a study by a trained economist of the application of child support guidelines with the ultimate goal that guidelines would be established which would conform to federal mandates for uniformity and the rebuttable presumption of validity, would reflect fair calculations of the amount required to raise children in a divorcing family, and would not necessarily link amounts due to shared custody; and

(b) Approve in principle, urge introduction of, and support legislation that would (1) amend Civil Code section 4700(a) by requiring that the court shall state its reasons in the minutes or on the record for all child support orders; (2) amend Civil Code section 4724 to provide and ensure that children, after divorce, continue to share in the increased standard of living of the higher income parent who may be the noncustodial spouse; and (3) extend the duration of child support obligations and the court's jurisdiction prospectively to age 21 for both children of divorced and intact families subject to existing statutory

exceptions and to the right of a parent to petition the court to terminate the support obligation after the child reaches 18 for good cause shown.

RECOMMENDATION 2

Request the Judicial Council to:

(a) Approve in principle, urge introduction of, and support legislation that would modify or repeal Civil Code section 4727 so that shared physical custody for more than 30 percent of a 365-day period will not automatically require a reduction in child support obligations; and

(b) Instruct the Advisory Commission Legal Forms to modify the family law forms to reflect notice of the provisions of Civil Code section 4700(b) for recovering child care expenses when the non-custodial parent fails to fulfill caretaking responsibilities, and to propose simplified application procedures for recovering the expenses.

RECOMMENDATION 3

Request the Judicial Council to:

(a) Review compliance with the statute that requires the superior court clerk to distribute booklets explaining parents' rights and duties relating to child support and augment and improve those efforts; and

(b) Study whether a system of informal assistance for unrepresented parties can be extended to parents seeking to collect unpaid child support or other forms of support such as medical insurance, medical expenses, and day-care costs.

2. SPOUSAL SUPPORT

RECOMMENDATION 4

Request the Judicial Council to ask the Family Law Advisory Committee to complete a study of spousal support orders including a review of whether the orders

are achieving the purpose of Civil Code section 480l(a) concerning the standard of living during the marriage as a point of reference in determining spousal support and compliance with Civil Code section 4390.3 providing for automatic wage assignments in spousal support awards; and propose recommendations for modification of spousal support laws to the Judicial Council, if necessary, including consideration of whether spousal support guidelines would be appropriate.

3. CUSTODY

RECOMMENDATION 5

Request the Judicial Council to target the study of joint custody and acquiring more information about best interests of children as a top priority for further research funded by the Family Court Services Program and for the relevant educational programs planned and administered by CJER and the AOC.

4. SPECIAL PROBLEMS: CUSTODY AND CHILD SEXUAL ABUSE

RECOMMENDATION 6

Request the Judicial Council to:

(a) Approve in principle and instruct staff and the appropriate committee to draft proposed legislation that would permit the family law judge and counsel in a case in which allegations of child abuse are raised to have confidential access to any existing investigatory reports submitted in the context of another proceeding outside the family law department, for example, by Child Protective Services, and to consider the need for ordering an expeditious investigation of the child abuse allegations if there are not adequate reports. The goal of all of the departments of the court should be to eliminate duplicative evaluations and to the extent possible limit the number to one court-ordered evaluation. The investigation ordered must be conducted by a competent investigator who is well-trained in the area of child abuse, and shall be completed and submitted to the court as quickly as possible;

(b) Approve in principle and instruct staff and the appropriate committee to draft a Standard of Judicial Administration setting forth a model protocol for judges resolving custody disputes involving child abuse allegations including those involving child sexual abuse; and

(c) Mandate the inclusion of child abuse issues, including sexual abuse, and the model protocol in family law judicial education programs and other judicial education programs as appropriate.

5. DIVISION OF MARITAL ASSETS

RECOMMENDATION 7

Request the Judicial Council to instruct the Advisory Committee on Legal Forms to (a) develop a simple petition form that would permit a spouse to request an accounting of the marital assets as now provided in Civil Code section 5125.1; and (b) amend the dissolution petition to add a provision requesting an accounting of marital assets.

B. IMPEDIMENTS TO THE NEUTRAL PARTICIPATION IN FAMILY LAW PROCEEDINGS FOR JUDGES, LAWYERS, AND MEDIATORS

1. JUDGES

RECOMMENDATION 8

Request that the Judicial Council refer to the Advisory Committee on Family Law the task of examining the working conditions and educational needs of family law judges and submitting recommendations for ways in which the family law assignment might be enhanced.

2. LAWYERS

RECOMMENDATION 9

Request the Judicial Council to:

(a) Commend the advisory committee's report to the State Bar and the Committee on Bar Examiners and urge

consideration of including family law on the State Bar exam;

(b) Urge further that education on gender bias issues in family law be required for certification as a family law specialist; and

(c) Commend the report to all law school deans and urge that gender bias issues in family law be incorporated into the law school curriculum.

RECOMMENDATION 10

Request the Judicial Council to refer to the Family Law Advisory Committee the issue of precluding without exception the taking of live testimony at hearings for temporary support, visitation, or custody.

3. MEDIATORS

RECOMMENDATION 11

Request the Judicial Council to:

(a) Instruct the Family Court Services Program to (1) include the issues of gender bias outlined in this section of the report with respect to gender stereotypes and the relative power balance between the parties in its mediator training programs; and (2) include an ethical duty to refrain from exhibiting gender bias or other bias in the course of a mediation in the standards of practice for court connected child custody mediation now under consideration by the Judicial Council;

(b) Approve in principle and instruct staff and the appropriate committee to draft a Rule of court that provides that to the extent recommendations are made to bench officers by mediators, the recommendations must be in writing with the reasons for the recommendations stated on a standard form developed for the purpose, and copies of the report and recommendation are to be made available to the parties by the court. The rule should further provide that to the extent a bench officer relies on the recommendations contained in the mediator's report in

making orders, the basis of the bench officer's determination is to be stated in the minutes or on the record unless otherwise waived by the parties;

(c) Refer jointly to the Family Law Advisory Committee and the Family Court Services Program the task of studying the custody evaluation process in California and request the submission of recommendations promoting improvement of the qualifications and professional standards of evaluators;

(d) Approve in principle and instruct staff and the appropriate committee to draft a Rule of court that would require that the parties to a mediation be informed at the initiation of the process what the process will entail and how the information obtained by the mediator will be used pursuant to proposed statewide mediation standards to be submitted to the Judicial Council;

(e) Approve in principle and instruct staff and the appropriate committee to draft a Rule of court that would create a simple grievance procedure for family law litigants who participate in mediation and that would vest oversight responsibilities in the presiding judge. The proposed rule should include a requirement that family law litigants be informed of the right to submit a complaint regarding the conduct of a mediator; and

(f) Seek adequate funding to accomplish the goals set forth in this recommendation.

4. DEVALUATION OF FAMILY LAW

RECOMMENDATION 12

Request the Judicial Council to:

(a) Refer the question of the need for more family law judges to the Judicial Council Court Profiles Advisory Committee and suggest that the committee should reevaluate the method of weighting family law cases to ensure that the number of bench officers available for assignment to family law is proportionate and appropriate to the family law workload;

(b) Approve in principle and instruct staff and the appropriate committee to draft amendments to the rules of court governing the duties of presiding judges to include a duty to allocate adequate judicial resources, with due regard to the constitutional and statutory priorities, to family law cases in proportion to the weights given family law cases in determining judgeship needs and ensure that those judicial officers assigned to family law receive training in family law; and

(c) Request the Center for Judicial Education and Research (CJER) to stress the need for affording the preference given to disputed custody trials by law in its judicial education programs for family law judges and presiding judges.

RECOMMENDATION 13

Request the Judicial Council to refer to the Family Law Advisory Committee the task of creating a pilot project applying the concepts of delay reduction and calendar management to family law cases. The advisory committee should work in cooperation with the gender bias implementation committee to ensure that issues of fairness are considered. The pilot project should be closely scrutinized and should contain both an evaluative and educational component.

RECOMMENDATION 14

Request the Judicial Council to instruct staff and the appropriate committee to develop protocols for coordination and cooperation among the family, juvenile, criminal, and probate departments within one court and among different courts as part of its implementation of Penal Code section 14010(b)(3), if funded, which requires the development of special procedures for coordination and cooperation in case management when a child is involved in overlapping proceedings.

**5. OTHER BARRIERS TO FULL AND FAIR ACCESS TO THE COURTS FOR FAMILY
LAW LITIGANTS**

RECOMMENDATION 15

Request the Judicial Council to instruct appropriate committees to develop a general information booklet or other educational device for family law litigants setting forth the court's procedures regarding custody, mediation, investigation, enforcement of orders, definitions of relevant legal terms, and the way to obtain an accounting of marital assets.

RECOMMENDATION 16

Request the Judicial Council to:

- (a) Officially transmit and commend the advisory committee report to the attention of the State Bar, especially with respect to those portions describing the current crisis in family law representation, which has a disparate effect on women litigants; and**
- (b) Urge the State Bar to conduct a study and report on solutions to this problem.**

RECOMMENDATION 17

Request the Judicial Council to support legislation introduced that would codify existing case law that requires the trial court in exercising its discretion to award attorney's fees under Civil Code section 4370 to consider the respective incomes and needs of the parties in order to ensure that each party has access to legal representation to preserve all of his or her rights.

V. CONCLUSION: FAMILY LAW AND THE FUTURE**RECOMMENDATION 18**

Request the Judicial Council to seek additional funding to add staff, budget, and other resources to provide for and ensure the creation of a uniform statistical reporting system in family law as required by statute and to reevaluate the priorities for research grants funded by the Family Court Services Program in light of this report.

CHAPTER SIX: DOMESTIC VIOLENCE**A. PROTECTIVE ORDERS****1. TEMPORARY RESTRAINING ORDERS—EX PARTE AND AFTER HEARING****RECOMMENDATION 1**

Request the Judicial Council to approve in principle and instruct staff and the appropriate committee to draft Rules of Court which would provide that:

(a) Ex parte temporary restraining orders shall be available during substantially all court hours, and emergency protective orders shall be available during all hours when an ex parte order is not available;

(b) An ex parte temporary restraining order shall be issued on the same day that the application is filed unless the application is filed too late in the day to permit effective review, in which case the petitioner shall be advised of the availability of emergency protective orders;

(c) The right to file an application for or obtain a temporary restraining order shall not be conditioned upon pursuing any other remedy, court service, or court proceeding;

(d) No applicant for an ex parte temporary restraining order shall be required to go to face-to-face mediation prior to attending the order-to-show-cause hearing

regarding the application for the temporary restraining order;

(e) Each court shall devise a simplified procedure to obtain a temporary restraining order, including allowance for prompt notification that the order has been signed and that it can be retrieved from an easily accessible location;

(f) An applicant for a temporary restraining order shall not be required to type the application as a condition of obtaining the order; clearly legible handwritten applications shall be acceptable;

(g) Judicial Council forms for temporary restraining order applications shall be made available free of charge at the courthouse, and a multilingual sign shall be posted in the clerk's office, pursuant to standards developed for determining the applicable languages, indicating where the forms may be obtained and hearings held;

(h) Temporary restraining orders in domestic violence cases may be issued by a judge of a municipal or justice court assigned by the Chairperson of the Judicial Council to the superior court in the county where the application for a temporary restraining order was made;

(I) No judicial officer or court shall have a policy that requires notice in all cases before issuance of an ex parte temporary restraining order, and the appropriate application form shall be amended to provide an opportunity to demonstrate good cause for lack of notice;

(j) When an ex parte change of custody or residence exclusion is granted without notice to the respondent, the court shall set an expedited hearing and shorten time for service;

(k) No court or judicial officer shall have a policy or practice that (1) automatically denies requests for residence exclusion orders; (2) applies unreasonable or arbitrary requirements for residence exclusion orders; or (3) when the judicial officer is satisfied that the applicant is in danger, requires a greater showing for residence exclusion orders than for other orders; and

(l) Support persons shall be allowed to accompany and support an applicant for a restraining order during all court proceedings, so long as they do not provide legal representation.

RECOMMENDATION 2

Request the Judicial Council to study ways to simplify the procedure for obtaining a temporary restraining order and:

(a) Approve in principle and request staff and the appropriate committee to draft a one-page form that includes the required application, declaration, and order;

(b) Mandate that the form be simplified so that relevant information is clarified and written in plain language;

(c) Mandate that the forms be modified to meet the needs of non-English-speaking persons, including the addition of an advisement in languages other than English about the use and purpose of the form and subject to the condition that the forms are to be completed in English;

(d) Request simplification of the in forma pauperis form;

(e) Permit the forms to be handwritten or computer generated;

(f) Request staff and the appropriate committee to draft a revised instructional pamphlet in languages other than English as needed that more clearly explains the procedures to be followed; and

(g) Approve in principle and request staff and the appropriate committee to draft a form for any court with jurisdiction over criminal matters to issue a restraining order pursuant to Penal Code section 136.2.

RECOMMENDATION 3

Request the Judicial Council to approve in principle and request staff and the appropriate committee to draft a new Standard of Judicial Administration as follows:

- (a) The judge should begin each hearing with a description of the procedure, ground rules, and what will be expected of all parties;**
- (b) The judge should take reasonable measures to provide for the safety of all persons in conjunction with the proceedings and to obtain the necessary level of support services, including those provided by law enforcement; and**
- (c) In cases where restraining orders are granted, the judge should inform the parties orally at the hearing that violations of the orders will subject the violator to contempt proceedings and arrest and are punishable as misdemeanors or felonies.**

RECOMMENDATION 4

Request the Judicial Council to approve in principle and request staff and the appropriate committee to draft a Rule of Court which would provide that mutual restraining orders shall not be issued either ex parte or after hearing absent written application, good cause, and the presence of the respondent.

RECOMMENDATION 5

Request the Judicial Council to approve in principle and request staff and the appropriate committee to draft new standards relating to calendaring of actions brought under the Domestic Violence Protection Act (DVPA) as follows:

- (a) Each court should adopt a policy that simplifies and expedites the calendaring of DVPA actions. Courts should be mindful of the needs of litigants when they develop this policy;**

(b) Each court shall schedule domestic violence calendars at a time that staffed children's waiting rooms are available for use by children; and

(c) In courts with no children's waiting room or other accommodation for children, children should not automatically be excluded from the courtroom.

2. EMERGENCY PROTECTIVE ORDERS

RECOMMENDATION 6

Request the Judicial Council to approve in principle and instruct staff and the appropriate committee to draft a rule or standard which would provide a clarification of the language of Code of Civil Procedure section 546(b) such that the expiration date provided for in the statute ("not later than the close of business on the second day of judicial business following the day of its issue") will be defined as the second day after the day the order is issued when the court is in session.

B. ACCESS TO THE JUDICIAL SYSTEM

1. COURT SAFETY

RECOMMENDATION 7

Request the Judicial Council to approve in principle and instruct staff and the appropriate committee to draft:

(a) A Standard of Judicial Administration relating to court safety which would recommend that: (1) all courts provide training for staff on how to deal with situations involving violent persons; (2) the family law and domestic violence departments and the Family Court Services office should be equipped with metal detectors; (3) escorts to and from the courthouse to the parking lot should be provided to anyone upon reasonable request; (4) the courts should provide safe, separate and/or guarded waiting areas for all court proceedings including mediation; and

(b) A rule that requires that bailiffs shall be available for use by family law and domestic violence departments as well as in Family Court Services.

2. NON-ENGLISH-SPEAKING VICTIMS OF DOMESTIC VIOLENCE

RECOMMENDATION 8

Request the Judicial Council to refer to the Advisory Committee on Court Interpreters and the Advisory Committee on Racial and Ethnic Bias the following proposals or issues:

(a) **Legislation that would provide for qualified interpreters in domestic violence cases and which would permit the use of multilingual court employees as interpreters;**

(b) **Creation of a statewide registry of qualified interpreters; and**

(c) **Access to the courts by non-English-speaking persons.**

C. CHILD CUSTODY/VISITATION

1. MEDIATION

RECOMMENDATION 9

Request the Judicial Council to approve in principle and request staff and the appropriate committee to draft Standards of Judicial Administration that would:

(a) **Define the role of Family Court Services in domestic violence cases as an in-house system that provides the following services: (1) identifies cases that involve domestic violence and codes the files to identify such cases; (2) makes appropriate referrals; (3) assures the safety of the victim and other parties; (4) assesses the facts surrounding the allegation of domestic violence; the possibility of the abuser's rehabilitation; the parent/child relationship with each parent and child; and the safety of children with each parent; and (5) provides for these services free of charge;**

(b) Establish minimum statewide standards for mediators regarding training, qualifications, protocols, and procedures for dealing with situations involving domestic violence, and that would prohibit counties from charging for their services; and

(c) Instruct the Family Court Services Program to provide ongoing training to all personnel on issues related to domestic violence including: (1) the cycle of violence and issues of safety; (2) the necessity for confidentiality of the victim's address; (3) issues affecting women as victims; (4) issues affecting men as victims; (5) avoiding preconceptions and judgments regarding the victim; (6) the need to understand the judicial process; (7) issues of equality and inequality in bargaining power; and (8) the risk that strict neutrality, that is, treating both parties the same, disadvantages victims of domestic violence.

D. CRIMINAL PROSECUTION

1. DIVERSION

RECOMMENDATION 10

Request the Judicial Council to approve in principle and instruct staff and the appropriate committee to draft a Rule of Court that would create statewide standards for diversion programs, with input from those knowledgeable about domestic violence and advocates for domestic violence victims, and statewide standards for effectively monitoring participation and successful completion of diversion programs.

2. DISTRICT ATTORNEYS/CITY ATTORNEYS

RECOMMENDATION 11

Request the Judicial Council to transmit the advisory committee's report and commend it to the attention of district attorneys and city attorneys who prosecute domestic violence offenses. The letter of transmittal should:

- (a) Outline the need for the treatment of domestic violence offenses as serious crimes and as felonies where warranted;**
- (b) Recommend establishment of a specially trained vertical prosecution unit to handle all domestic violence cases whenever possible;**
- (c) Recommend training for prosecutors regarding the availability of restraining orders pursuant to Penal Code section 136.2 in the criminal courts and encourage their use;**
- (d) Recommend training for prosecutors regarding standards for effective diversion programs, including effective monitoring;**
- (e) Recommend training for prosecutors about interaction with domestic violence victims;**
- (f) Encourage district attorneys and city attorneys to continue to use victim/witness programs; and**
- (g) Recommend that the prosecutor file and pursue charges, where the evidence justifies such an action, regardless of whether the victim is willing to cooperate or to testify.**

3. VICTIM-WITNESS ASSISTANCE PROGRAMS

RECOMMENDATION 12

Request the Judicial Council to affirm the need for publicly funded, active victim-witness programs in each county to deal with domestic violence victims and commend and encourage the continued funding and support of these programs.

4. LAW ENFORCEMENT**RECOMMENDATION 13**

Request the Judicial Council to transmit the advisory committee's report and commend the report to the attention of law enforcement organizations and:

- (a) Highlight the need to give preference in service of process in domestic violence cases;**
- (b) Highlight the testimony in the report dealing with the need to treat domestic violence cases with the same seriousness as similar crimes against strangers;**
- (c) Highlight the testimony in the report dealing with the need to protect the victim after the alleged battery for long enough to permit the victim to arrange for his or her safety;**
- (d) Suggest the need for training of law enforcement officers on emergency protective orders, their availability, the means to notify victims, and how to obtain issuance;**
- (e) Suggest the need for training that restraining orders are to be enforced even where mutual orders have been issued by the court, and stress ways to accomplish the enforcement of mutual orders, that violation of restraining orders is cause for arrest, and that proof of service need not be filed with the court before enforcement is required; and**
- (f) Suggest that law enforcement training should be conducted by experts on all aspects of domestic violence including the characteristics of the victim and the batterer, the seriousness of the crime, the need for arrest, measures to protect the victim, the need to make reports, and the need to give prompt attention to calls.**

E. JUDICIAL EDUCATION**RECOMMENDATION 14**

Request the Judicial Council to urge the Center for Judicial Education and Research (CJER) to conduct training of all judges on the following issues:

- (a) The psychological profiles of both victims and batterers;**
- (b) The nature and perpetuation of the cycle of violence and the battered women's syndrome;**
- (c) An understanding of the nature of the victim's experience and emotional state;**
- (d) An understanding of the intimidating effects the court system has on victims of domestic violence;**
- (e) An understanding of the role of professionals who work in the area of domestic violence including expert witnesses and lay advocates;**
- (f) The need to issue enforceable and effective restraining orders and attention to whether the order should take effect immediately, should limit the taking of property, and should not be too limited in time;**
- (g) The need to inform victims of the availability of emergency protective orders by telephone;**
- (h) The need for focus on problems of the poor and minorities, including adequate representation, interpreters, and the avoidance of stereotypes about gender-based violence in ethnic or minority communities; the need for monitoring diversion to ensure that an effective program is completed; and**
- (i) Knowledge of safety measures to protect the victim including supervised visitation, neutral pickup points, third-party visitation arrangements, or creative visitation plans.**

RECOMMENDATION 15

Request the Judicial Council to approve in principle and instruct staff and the appropriate committee to draft a Standard of Judicial Administration that would provide that, in cases where domestic violence has been established, custody or visitation orders should be issued in such a way as to ensure the safety of the victim of domestic violence, whether by supervised visitation, neutral pickup points, third-party visitation arrangements, or other creative visitation plans that protect all parties, including the children, from further violence or emotional harm.

RECOMMENDATION 16

Request the Judicial Council to approve in principle and instruct staff and the appropriate committee to draft a Standard of Judicial Administration encouraging each court to establish a committee composed of representatives from all sections of the domestic violence community. The role of these committees is to make recommendations to the court about policies and procedures for handling cases involving domestic violence.

CHAPTER SEVEN: CRIMINAL AND JUVENILE LAW**A. APPOINTED COUNSEL****RECOMMENDATION 1**

Request the Judicial Council to approve in principle and instruct staff and the appropriate committee to draft:

(1) A Standard of Judicial Administration for trial courts, and an amendment to section 24 of the Standards of Judicial Administration for juvenile courts, which would provide a model local rule setting forth a policy with respect to the appointment of counsel to ensure equal access for all attorneys, regardless of gender, race, or ethnicity; and

(2) A rule of court requiring that each local court establish by local rule a policy for the appointment of counsel. The proposed rule shall provide that in the event a court fails to adopt a local rule regarding appointed counsel, the model rule contained in the standards shall be deemed the local rule.

The standards for the appointment of counsel shall include:

(1) A recruitment protocol to ensure dissemination to all local bar associations, including women and minority bar associations;

(2) A written description of the selection process that includes a statement of: minimum qualifications; application procedure; and selection procedure; and

(3) Regularly scheduled recruitment.

The proposed rule shall further provide for a mechanism for collecting and reporting statistical information on the gender, race, and ethnicity of attorneys appointed, in order to monitor implementation of the local rule. The mechanism should be developed on a countywide basis and cover at least a three-year period. The findings of the three-year study should be included in the Judicial Council's Annual Report to the Governor and the Legislature.

B. PROGRAMS, SERVICES, AND FACILITIES FOR INMATES

1. LOCAL PROGRAMS AND SERVICES ADMINISTERED OR SUPERVISED BY PROBATION DEPARTMENTS OR COUNTY WELFARE AGENCIES

RECOMMENDATION 2

(a) Request the Judicial Council to recommend to local probation departments that (1) sentencing and dispositional alternatives and rehabilitation programs for adults and juveniles administered or supervised by probation departments be augmented so that they are made available on an equivalent basis to males and females, without diminishing the services presently available; (2) sentencing and dispositional alternatives and

rehabilitation programs for adults and juveniles administered or supervised by probation departments be made available to meet the special needs of pregnant women and women with young children; and (3) residential programs administered or supervised by the probation departments be maintained in facilities with space suitable for family visitation; and

(b) Request the Judicial Council to approve in principle and instruct staff and the appropriate committee to draft a standard of judicial Administration for trial courts, and to amend section 24 of the Standards of Judicial Administration for juvenile courts, to encourage each judge presiding over criminal and juvenile cases to become familiar with and consider sentencing and dispositional alternatives and programs available through the probation department.

2. INSTITUTIONS AND PLACEMENTS

RECOMMENDATION 3

(a) Request the Judicial Council to recommend to the Department of Corrections, California Youth Authority, and local agencies that adult and juvenile facilities (institutions and placements), for detention, disposition, or sentencing, be augmented so that they are made available on an equivalent basis for males and females, without a diminution of facilities presently available; and

(b) Request the Judicial Council to approve in principle and instruct staff and the appropriate committee to draft a standard of judicial administration for trial courts, and to amend section 24 of the Standards of Judicial Administration for juvenile courts, to encourage each judge presiding over criminal and juvenile court proceedings to become personally familiar with all detention facilities, placements, and institutions used by the court for males and females.

3. EDUCATION AND TRAINING PROGRAMS**RECOMMENDATION 4**

(a) Request the Judicial Council to recommend to the Department of Corrections, California Youth Authority, and local agencies that the nature and extent of education and training programs in adult and juvenile facilities be augmented so that they are equivalent for males and females (see Title 15 of the Administrative Code, divisions 4 and 7), without diminishing those programs presently available. Education and training programs should include: (1) basic education courses with basic reading and math skills and access to higher educational opportunities; (2) a variety of vocational training without traditional gender classifications and limitations; (3) health education with emphasis on sex education and on prenatal/perinatal care; (4) parenting skills, including programs facilitating contact visits; and (5) drug and alcohol rehabilitation programs; and

(b) Request the Judicial Council to approve in principle and instruct staff and the appropriate committee to draft and publicize a standard of judicial administration, and an amendment to section 24 of the Standards of Judicial Administration for juvenile courts, to encourage each judge presiding over criminal and juvenile proceedings to become personally familiar with the education and training programs in state and local facilities available for males and females.

RECOMMENDATION 4-A

(a) Request the Judicial Council to approve in principle and instruct staff and the appropriate committee to draft an amendment to California Rules of Court, rule 206 to provide that all judges hearing juvenile or criminal matters have the duty to report to the presiding judge any consistent and unreasonable inequalities they may have observed in the availability of equivalent sentencing and disposition alternatives administered through probation departments, facilities (institutions and placement), and

education and training programs for adult and juvenile offenders; and

(b) Request the Judicial Council to amend California Rules of Court, rules 205 and 532.5 relating to the duties of presiding judges to require each presiding judge to alert the Administrative Office of the Courts of any deficiencies reported under proposed rule 206 described above.

C. SPECIAL NEEDS OF INSTITUTIONALIZED FEMALES

RECOMMENDATION 5

(a) Request the Judicial Council to recommend to the Department of Corrections and the California Youth Authority and local agencies that the protocols for institutionalized females be re-examined and modified to institute practices which recognize the specific needs of women (see Title 15 of the Administrative Code, divisions 4 and 7). The protocols should specifically address: (1) provision for adequate and appropriate clothing adequate or suitable for female anatomy; (2) provisions for meeting personal hygiene and sanitation needs and increased access to laundry facilities during the menstrual cycle; (3) hardware and shackles of the size, weight, and shape that is suitable for the female form.

The protocols should also address pregnancy-related issues. Limits on the use of leg chains, waist chains, and handcuffs should be encouraged unless there is a security risk. Pregnancy should not limit a woman's ability to earn work credits. Job assignments should be made with a physician's approval. Protocols for expansion of the Mother/Infant Care Program under Penal Code section 3410 et seq., and establishment of similar local programs for mother and children should be considered. Protocols for visiting with children of inmates should also be considered.

(b) Request the Judicial Council to approve in principle and instruct staff and the appropriate committee to draft a Standard of Judicial Administration, and amend section 24 of the Standards of Juvenile Administration for juvenile courts, to encourage each judge presiding over criminal

and juvenile proceedings to become familiar with these protocols.

D. MEDICAL PROBLEMS OF INSTITUTIONALIZED FEMALES

RECOMMENDATION 6

Request the Judicial Council to recommend to the Department of Corrections, the California Youth Authority and local agencies the adoption of protocols requiring appropriate medical services for incarcerated and institutionalized females, including:

- (a) Full gynecological care;
- (b) Pregnancy-related services, including (1) pregnancy screening (voluntary) with pregnancy classification upon confirmation; (2) special diet; (3) pre-natal/perinatal care; (4) appropriate housing (lower bunks, medical unit); (5) access to abortion as provided by the laws on this subject; (6) transportation to medical services/hospital; and (7) procedures for dealing with pregnancy-related medical emergencies;
- (c) Medically supervised drug detoxification program; and
- (d) Voluntary, confidential AIDS testing and counseling.

E. SEXUAL ASSAULT AND SEXUAL HARASSMENT SUFFERED BY INMATES

RECOMMENDATION 7

Request the Judicial Council to recommend to the Department of Corrections, California Youth Authority and local agencies operating adult and juvenile detention facilities (see Title 15 of the Administrative Code, sections 4 and 7), that they implement policies and procedures to assure detainees' safety from sexual harassment and sexual assault perpetrated by (1) guards, counselors or staff; (2) other inmates, detainees in the institution; and (3) inmates with whom contact is made during transportation to and from court and in the courthouse lock-up.

F. JUVENILE DEPENDENCY PROCEEDINGS**1. PARENTAL IGNORANCE OF DEPENDENCY LAW AND PROCEDURES****RECOMMENDATION 8**

Request the Judicial Council to approve the following changes in principle and instruct staff and the appropriate committee to:

- (a) Revise the informational brochure on dependency law and procedure;**
- (b) Produce an informational video on dependency law and procedure;**
- (c) Draft amendments to the juvenile court rules to require that the informational brochure be given to parents in court; and**
- (d) Recommend to the Department of Corrections, the California Youth Authority and local detention and placement facilities to require dissemination of the brochure and use of the video in their facilities (see Title 15 of the Administrative Code, divisions 4 and 7).**

2. NOTICE TO PARENTS IN CUSTODY OR DETENTION REGARDING DEPENDENCY, DELINQUENCY, AND TERMINATION OF PARENTAL RIGHTS PROCEEDINGS**RECOMMENDATION 9**

Request the Judicial Council to approve in principle and instruct staff and the appropriate committee to draft:

- (a) Proposed legislation or support legislation introduced which would amend the Welfare and Institutions Code to require the Department of Corrections, California Youth Authority and local agencies responsible for detention of inmates to implement protocols to be followed in notifying and securing the presence of parents confined at such facilities at dependency, delinquency, or termination of parental rights proceedings (see Title 15 of the Administrative Code, divisions 4 and 7);**

(b) A Standard of Judicial Administration which would encourage all bench officers and court personnel to become familiar with the procedures for obtaining the release and the return of such inmates. The standard should also encourage the use of low-cost facsimile machines which will speed up the notification process and increase the likelihood of a timely hearing, thus reducing the cost of such procedures by minimizing delays; and

(c) A notice and proof of service form to be used for incarcerated and detained parents.

G. ENHANCING STATUS OF THE JUVENILE COURT

RECOMMENDATION 10

Request the Judicial Council to refer the following issues to its Advisory Committee on Juvenile Court Law for study and recommendations:

(a) Reevaluation of weighted caseload measures to accurately reflect the complexities of juvenile court law, statutorily mandated multiple review hearings, and intense court supervision required in juvenile dependency cases;

(b) Review judicial assignment procedures and inadequate facilities and staffing in juvenile court; and

(c) Review methods to enhance status of juvenile court and the judicial assignments to that court.

H. JUDICIAL TRAINING

RECOMMENDATION 11

Request the Judicial Council to approve in principle and instruct staff and the appropriate committee to draft:

(a) Standards of Judicial Administration which encourage CJER and local courts to develop training on issues of gender bias in the areas of criminal and juvenile law and issues of gender bias in general. The training should include programs for juvenile court referees;

(b) **Standards of Judicial Administration that require CJER and local courts to develop training on issues and techniques which relate to attitudes of gender bias as it pertains to trial and jury selection in matters involving sexual assault, domestic violence and child abuse; and**

(c) **An amendment to section 8.5 of the Standards of Judicial Administration on examination of prospective jurors in criminal cases to include recommended questions which relate to attitudes of gender bias as it pertains to cases involving sexual assault, domestic violence and child abuse.**

CHAPTER EIGHT: COURT ADMINISTRATION

A. COURT EMPLOYMENT PRACTICES

1. NEED FOR COMPREHENSIVE PERSONNEL PLANS

RECOMMENDATION 1

(a) **Request the Judicial Council to endorse the continuing development and implementation of new personnel policies and practices to promote the efficient administration of justice and to eliminate gender bias;**

(b) **Toward this end, request the Judicial Council to approve in principle and instruct staff and the appropriate committee to draft: (1) amendments to California Rules of Court, rule 205(11), rule 207(1), and rule 532.5, to establish in courts covered by these rules, written court personnel plans consistent with a new Standard of Judicial Administration to be adopted; and**

(c) **Further amendments to rules 205, 207, and rule 532.5, to require by March 1 of each year a calendar year report to the AOC regarding the contents of the court personnel plan, including data indicating implementation of the plan, such as affirmative action reports.**

2. ELEMENTS OF A PERSONNEL PLAN

RECOMMENDATION 2

Request the Judicial Council to approve in principle and instruct staff and the appropriate committee to draft a Standard of Judicial Administration outlining the elements of a court personnel plan, applicable to the courts covered by rules 205, 207, and 532.5, with the explicit proviso that the courts should work closely with the County Board of Supervisors and other county officials regarding compensation, benefits, and conditions of employment for all employees in the court. This Standard of Judicial Administration would incorporate preferred personnel practices and would note that a court plan should, but is not required to, include at least the following items because plans without written guidance on these items create a climate in which bias is more likely to occur:

- (a) Sound and equitable salary-setting procedures;**
- (b) Revised job classifications and titles;**
- (c) Criteria and standards for promotion;**
- (d) Regular performance evaluations for all levels of employees;**
- (e) An affirmative action plan applying to all court personnel in accordance with applicable state and federal law;**
- (f) Job-related training and continuing education programs for all court personnel as appropriate to their level, including but not limited to (i) affirmative action concepts and recruitment methods; (ii) sexual harassment detection, prevention, and remedies; (iii) career development, including basic skills, managerial skills, and time off for education; and (iv) gender bias;**
- (g) A sexual harassment policy;**
- (h) Grievance procedures covering, but not limited to, sexual harassment;**
- (i) A policy statement on professional behavior, requiring that all employees must conduct themselves in a**

professional manner at all times and refrain from offensive conduct or comments that reflect gender bias; and

(j) An employee benefits plan that may, when consistent with court requirements and county policies, but is not required to, include: (i) flex-time, part-time, job-sharing, or other alternative work schedules; (ii) disability leave, including pregnancy leave in accordance with Government Code section 12926(c); (iii) unpaid leaves, including parental leave; and (iv) "cafeteria" options to use pretax dollars for dependent care and banked sick leave for care of dependents.

3. NEED FOR JUDGES TO APPROVE AND COMPLY WITH THE PERSONNEL PLAN

RECOMMENDATION 3

Request the Judicial Council to approve in principle and instruct staff and the appropriate committee to draft amendments to California Rules of Court, rules 206 and 534, to require that each judge in superior and municipal courts shall comply with the courts' personnel plans.

4. ADMINISTRATIVE OFFICE OF THE COURTS AS A RESOURCE AND CLEARINGHOUSE FOR COURT PERSONNEL PLANS

RECOMMENDATION 4

Request the Judicial Council to seek additional AOC staff:

(a) To assist the courts in developing the court personnel plans required by the amended rules;

(b) To develop reporting forms and to collect and analyze the data on personnel policies, plans, and practices required annually by the amended rules in order to identify desirable personnel practices and minimum standards for courts that would aid in the elimination of gender bias; and

(c) To act as a resource for courts by developing alternative personnel plans, compiling "case studies" from courts reflecting successful implementation of, for example, flex-time or gender bias training, and providing videotape

or other training on subjects such as gender bias and sexual harassment.

5. NEED FOR TRAINING OF ALL COURTROOM ATTACHÉS

RECOMMENDATION 5

Request the Judicial Council to approve in principle and instruct staff and the appropriate committee to draft amendments to California Rules of Court, rule 205 and rule 532.5, to provide that the presiding judge shall evaluate the policies and training programs concerning gender fairness and sexual harassment available for county clerk employees, bailiffs, probation officers, and other regular courtroom participants and may recommend that these individuals attend training programs on gender fairness and sexual harassment offered by the courts or other agencies.

B. JUDICIAL LEAVE POLICY

RECOMMENDATION 6

Request the Judicial Council to approve in principle and instruct staff and the appropriate committee to draft amendments to California Rules of Court, rule 205 and rule 532.5, to establish a comprehensive leave policy for judges, including appropriate pregnancy-related leave and parental leave policies, sick leave, disability leave, and family compassionate leave.

C. CHILD CARE FOR COURT EMPLOYEES AND COURT PARTICIPANTS

1. CHILD CARE FOR COURT EMPLOYEES

RECOMMENDATION 7

Request the Judicial Council to add to the charge of its Facilities Advisory Committee the need to develop ways for counties and courts to work together to ameliorate the important problem of creating quality and affordable child care for all court employees and judicial officers near where they work.

2. CHILD CARE FOR COURT PARTICIPANTS

RECOMMENDATION 8

Request the Judicial Council to recommend to its Facilities Advisory Committee that waiting rooms for children of court participants be made a priority issue.

D. EMPLOYMENT PRACTICES AND GENDER-BIASED TEACHING IN LAW SCHOOLS**RECOMMENDATION 9**

Due to the primary importance of educating all members of the profession on the nature and effects of gender bias in the legal system, request the Judicial Council to transmit to and urge consideration by the deans of law schools and schools training legal technicians the Advisory Committee's recommendation that the schools develop written policies and other programs that will:

- (a) Eliminate gender bias from classroom interactions, casebooks, and course materials;**
- (b) Eliminate gender bias and encourage diversity in the hiring, promotion, and tenure of faculty;**
- (c) Include gender and other fairness as an integral part of all professional responsibility courses;**
- (d) Include an analysis of the way in which gender bias can taint expert testimony, cross-examination, interpersonal conduct between attorneys and between attorneys and judges, jury selection, and juror use;**
- (e) Provide grievance procedures and discipline for sexual harassment by students, faculty, or employees; and**
- (f) Eliminate gender bias in on-campus recruiting.**

Further, request the Judicial Council to transmit to and urge consideration by the State Bar and the Committee of Bar Examiners the Advisory Committee's recommendations to the law schools, as appropriate, and further urge that representatives of the State Bar and the Committee of

Bar Examiners meet with the law school deans on these subjects.

CHAPTER NINE: IMPLEMENTATION

II. THE NEED FOR AN IMPLEMENTATION COMMITTEE

RECOMMENDATION 1

Request the Judicial Council to recommend that the Chief Justice appoint an advisory committee for implementation comprised of some members of the Judicial Council Advisory Committee on Gender Bias in the Courts and others, to assist the Judicial Council with the implementation of the recommendations in this report and with evaluating their effectiveness.

III. THE NEED FOR JUDICIAL EDUCATION

RECOMMENDATION 2

(a) Request the Judicial Council to approve in principle and instruct staff and the appropriate committee to draft a Standard of Judicial Administration that would provide for (1) every new and newly elevated judge or commissioner to attend the California Judicial College within two years of becoming a judicial officer; (2) the inclusion of gender bias issues in the curriculum of both the college and the orientation program for judicial officers and inclusion in the substantive law courses in these to programs of components on gender bias issues relevant to the subject matter;

(b) Request the Judicial Council to urge CJER's Governing Committee to create a special committee to address the significant problem of judicial education in family law. The committee's task would be to develop a program and curriculum in family law designed to ensure that every judicial officer hearing family law matters, including retired judges and those who hear matters only occasionally, would be educated in general on family law issues and more specifically on issues of gender bias arising in family law. CJER's Governing Committee should

report back to the Judicial Council within one year with a proposed plan. Upon completion of an appropriate plan which takes into consideration the need for adequate staffing of the courts during a judicial officer's absence for educational purposes, a rule would be proposed which would require each judicial officer who hears family law matters to complete the program;

(c) Request the Director of the Administrative Office of the Courts to select a working group or committee composed of representatives from educational programs for judges, attorneys, court staff, mediators, law students and others involved in the justice system. The task of the committee would be to coordinate efforts to develop quality educational programs on gender bias and other biases, to exchange information, and to provide technical assistance and resources to those engaged in this effort; and

(d) Request CJER to develop a program which would teach CJER's instructors the subtleties and complexities of handling gender bias courses and train them in effective and innovative teaching methods.

CHAPTER TEN: MAJORITY OF MINORITIES

III. THE NEED FOR A TASK FORCE ON ETHNIC AND RACIAL ISSUES OF BIAS IN THE COURTS

RECOMMENDATION 1

Request the Chief Justice to appoint an advisory committee to examine racial and ethnic bias in the California courts and make recommendations to the Judicial Council to correct any problems identified. The advisory committee should be characterized as follows:

(a) It should be structured to maximize its operational independence;

(b) The co-chairs should be appointed first and subsequently asked to submit their recommendations to the Chief Justice for the remainder of the committee

appointments. The recommendations should reflect the goal of securing primary participation by members of the various ethnic and racial communities in California;

(c) The first task of the committee will be to develop its working definition of racial and ethnic bias in the court system and to adopt an agenda of the topics it plans to consider. In developing a working definition of racial and ethnic bias, the advisory committee may wish to consider the following suggested definition:

Racial and ethnic bias includes behavior or decision making of participants in the justice system that is based on or reveals (1) disparate treatment of individuals based on race or ethnicity; (2) stereotypical attitudes regarding race and ethnicity; or (3) lack of understanding or misconceptions about racial and ethnic cultural differences and life experiences.

In developing a list of topics to consider, the appointed advisory committee may wish to consider the following suggested topics:

- Courtroom interaction
- Judicial fact finding and decision-making
- Racial and ethnic bias within judicial administration, including court employment
- Selection, hiring, or retention of court-appointed counsel and ancillary officials, including security staff
- Hiring, promotion, and retention of attorneys
- Jury selection
- Juvenile justice
- Criminal law including disparity of treatment
- Sentencing and probation, including diversity of probation officers
- Family law-related issues including custody and support
- Continuing education for judges, lawyers, and court staff
- Housing and landlord-tenant issues

Special problems of non-English-speaking persons, especially with respect to the need for interpreters

- **Ways in which the perception of bias impedes access to the court system and full participation in court proceedings**
- **Other factors, such as economic status, which diminish access to the court system.**

RECOMMENDATION 2

Urge the Chief Justice to call for the joint creation of a Justice System Task Force from the different branches of government to examine racial and ethnic bias in the justice system. The Judicial Council Advisory Committee on Racial and Ethnic Bias would form only one component of such a task force, which would also include representation from similar committees formed in the Legislature, in the Office of the Attorney General, in the Governor's Office, and in the State Bar. The Judicial Council Advisory Committee on Gender Bias in the Courts particularly recommends that the inquiry on racial and ethnic issues be expanded in this way because of the committee's recognition from its own experience that many of the solutions to these problems require a cooperative effort on the part of all justice system agencies.

Chapter Thirteen

Appendices